Abstract

Over the last 30 years one of the drivers of the internet which we have today has been the extent to which ordinary people have been able to use the many platforms which have been created as a basis for the exchange or dissemination of ideas; citizen journalism has become a thing and with it there has been an explosion of material online. Irrespective of one’s views or interests, it is likely that somewhere online there will be a forum, group or website devoted to those views or interests in which you can interact with similar-minded individuals.

Of course, many of those views may be contrary to our own, but the joy of the internet is that if one set of views is unacceptable, there will be another somewhere else which corresponds with our own (or at least which we are prepared to tolerate).

That basic fact, combined with the apparent anonymity which the internet affords, has given rise to potential legal challenges which have required to be addressed by legislation.

The basic rule in the “real” world is that a person who publishes something is liable for any legal infringement caused thereby; hence, for as long as the ability to publish has been around, publishers have been punished for the publication or dissemination of illegal, offensive or unacceptable material.

Whilst rare, there have been cases in which publishers have been found liable for publishing material with erroneous chemical experiment warnings; for advertising for a mercenary; for incorrect instructions in a flight manual. However, these cases are rare.

More common are the cases in which what is published by the publisher (the platform in internet terms) is material uploaded by a third party without the direct intervention of the publisher; indeed, in most cases, the publisher will be unaware of what is being uploaded. Hardly surprising when recent statistics indicate that:

1 David Flint, Solicitor, Scotland; Commercial Law Consultant at Inksters (www.inksters.com) and Visiting Professor at Creighton University Law School, Omaha, Nebraska.
Over 300 million photos uploaded to Facebook every day;  
An average of 300 hours of video are uploaded every minute on YouTube;  
Approximately 60 billion texts daily are sent on WhatsApp;  
On average, 95 million photos are uploaded daily on Instagram;  
Twitter users are posting a billion tweets in a week;  
Approximately 3 billion snaps are created every day on Snapchat;  
There are more than 175 Billion Pinterest Pins.
…… and that is the tip of the iceberg.

Clearly it is no longer possible for the publisher to review every single posting before it appears.

For that reason, legislatures in the United States and in the EU have passed legislation which makes it clear that whilst the author of any illegal or infringing (usually of copyright) material remains liable for his behaviour, the publisher (as operator of the platform) will be indemnified from liability provided that his role is a passive one – i.e. he has no prior knowledge of what is to be posted and is not involved in the posting (such as by moderation or selection) and provided that he removes the material as soon as its illegality or infringement is known to him (or he should have known). There have been a number of cases dealing with the knowledge of ISPs as publishers, both in the US and in the EU and in brief, the courts have not been sympathetic to arguments based on lack of knowledge where it was crystal clear that any reasonable person would have known.

Until recently, the US and EU position was, in principle, the same; there were nuances based on the existence of First Amendment rights, but generally the principles were identical.

With the enactment earlier this year of the EU Copyright Directive 2019/790, all this may be changing; Article 17 of the Directive seeks to make the ISP liable for material which it publishes where there is no authorisation from the copyright owner save in certain limited circumstances – which may be very difficult to achieve given the volumes quoted above. It remains unclear how this will be enacted into national laws in the EU but given the opposition from some Member States, it is not impossible that implementation will be inconsistent and slow.

In the United States, there have been attempts to narrow the scope of S230 of the Communications Decency Act which provides that a website or other internet service shall not “be treated as the publisher or speaker of any information provided by” a user or other party. Although
federal criminal prosecutions are exempted from CDA S230 immunity, the statute nevertheless provides a broad liability shield to internet companies when a lawsuit turns on user-generated content.

On April 11, 2018 the President signed into law the “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” (FOSTA) which amends S230 to

The Stop Enabling Sex Traffickers Act (SESTA) and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA) are the U.S. Senate and House bills that as the FOSTA-SESTA package became law on April 11, 2018. They clarify the country’s sex trafficking law to make it illegal to knowingly assist, facilitate, or support sex trafficking, and amend the Section 230 safe harbors of the Communications Decency Act (which make online services immune from civil liability for the actions of their users) to exclude enforcement of federal or state sex trafficking laws from its immunity.

Is this the thin end of a wedge to remove the blanket immunity of S230 and the First and Fifth Amendment rights which it protects? The Electronic Frontier Foundation (EFF) certainly thinks so, and is challenging its constitutionality before the courts. Monitoring for Sex Trafficking today (which we all agree is a “bad thing”): which victims group will seek a greater attack surface next?

The content industry is a major lobby group much of which is unhappy with the immunity provided by S230 (although much is also a platform); will they be next to lobby for a carve out?
Your Web Content and Diverging Rules in EU and US on ISP Liability for Copyright Infringement - An EU perspective*

INTRODUCTION

The growth of the Internet has been facilitated in a large part by the growth of user generated content; of citizen journalism and of a myriad of social media services. The gated communities of 20 years ago – America Online, AOL, Compuserve, Yahoo Groups and the like have given way to a plethora of sites in which the public can express their views. Leaving aside the much greater societal issue of “fake news” (which I see is the subject matter of another panel here in Washington) – and “fake” is itself a very subjective concept – individuals are able to post material, comment on others’ material, express views, post reviews and generally interact with others online.

Since the earliest days of printing, publishers of material have had a responsibility and indeed a liability for the material which they have published; however, until the advent of the internet, this responsibility was relatively straightforward to police as publishing, whether by printing or latterly broadcast was an expensive, capital and labour intensive activity and therefore those who engaged in those activities could be readily identified and brought to account were they to step over the line

In Europe, without the inherent protections and, simultaneously, challenges of the First Amendment, it was relatively simple to prevent some types of
material from being disseminated. Publishers were held liable for any material which they published in their newspapers or broadcast on the relatively few broadcast media which existed until relatively recently, if the material infringed the rights of others; the “publisher” of the infringing material was easy to identify and bring to book.

**THE 2000 E-COMMERCE DIRECTIVE AND BEYOND**

Within the EU, the initial legislation to support what the EU describe as “Information Society Services” was in Directive 2000/31/EC of 8 June 2000.

Recital (5) of the 2000 Directive states the objective as follows:

“(5) The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State.”

In the international sphere, as we shall see, such a laudable objective seems to be increasingly diverged from as individual jurisdictions seek to leverage their own position to the detriment of a common order. The Directive specifically does not seek to harmonise taxation rules in relation to the taxation of Information Society Services within the EU.

For those less familiar with the legislative forms within the EU, a Directive is a legal instrument which sets out that which is to be achieved (as a minimum

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base level) whilst leaving it to the individual Member States to determine how best to incorporate these principles into national law. The advantage is that agreement may be reached more quickly – a major issue with 28 different Member States and 30+ legal systems (the UK has several); the disadvantage is that each Member State will implement the rules in a slightly different way, often adding additional provisions for a domestic imperative or “gold plating” the requirements. In the field of e-commerce and Information Society Services, harmonisation has been largely achieved (insofar as it has) by way of Directives.

“Information Society Services” are defined in Directive 98/34/EC of 22 June 1998¹ as amended² as being:

“…. any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

- "at a distance" means that the service is provided without the parties being simultaneously present,
- "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,
- "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.”

(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial

² Directive 98/34/EC, Article 1(2)
communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.\(^1\)

(19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.\(^2\)

Following upon those general definitions, the area with which we are most concerned today relates to the exemptions from the traditional – pre internet – rules of liability for those who publish information; namely that the publisher is liable for that which he publishes (whether he wrote the offending material or not).

This traditional approach is varied in the case of Information Society Service

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\(^1\) Directive 2000/31/EC, Recital 18.
Providers by the provisions of Section 4 of the 2000 Directive\(^1\).

Article 12 "**Mere Conduit**" provides:

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.”

Article 13 "**Caching**" states:

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information’s onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.” (emphasis added)

Article 14 “**Hosting**” states:

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information

\(^1\) Directive 2000/31/EC, Section 4 (Article 12 et seq.). “Liability of intermediary service providers”
and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information." (emphasis added)

Finally here, Article 15 “No general obligation to monitor” states:

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. ……

Unfortunately, as with all Directives, particularly those relating to a fast-moving area of law, such as Information Society Services, there will be areas of doubt and differing interpretations.

In some Member States location and information finding services, such as search engines are dealt with specifically in the legislation; in others case law has found them to be mere conduits or caching and hosting services; there is no consistency.

The same is true for video sharing websites; For instance, in France, the video service DailyMotion was considered a host. Even though the DailyMotion architecture allowed for the formatting and encoding of content, this was considered an essential and integral part of the hosting activity. In Germany, the courts took a different approach, however. They deemed that YouTube could not benefit from the liability exemption. A key element in the court’s reasoning was the look and feel of the website: YouTube had a very specific layout and the YouTube logo was always present. Following their argument,

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content platforms cannot claim to be a host if third party content appears to be the provider’s own content. Moreover, suggestions based on viewer behaviour indicated that YouTube exercised editorial control. In Italy, YouTube was considered to be a digital broadcaster and thus fully responsible for the published content.

Notwithstanding the limited immunity from liability in Directive 2000/31/EC, and implementing national legislation there is still the possibility of an ISP being faced with an injunction requiring it to remove copyright infringing material or block access to it.

The question following from Directive 2000/31/EC was what was meant by “actual knowledge” or “awareness” for the purposes of Articles 13.1(e) and 14.1(b). Unlike the provisions in the U.S. DMCA\(^1\), there is no takedown notice procedure under the E-Commerce Directive. The usual course will be for a content owner to advise the ISP that there is an infringement and then, in most cases, the ISP removes or blocks it. This seems to go against the direct wording of the Directive and the plain meaning of the words “actual knowledge” and may be closer to constructive knowledge. Under actual knowledge, if the ISP knows that there is some material on the Internet that violates someone’s rights, then the ISP will be held liable. Under constructive knowledge, the law may determine if the ISP has certain clues, or should have reasonably presumed that certain material was infringing someone’s rights, thereby making the ISP liable.

With over 300 hours of video uploaded to YouTube alone every minute\(^1\), ISPs are not able to check every allegation of infringement made by a content provider and it has proved easier and simpler just to remove the material complained of. There is no process for counternotice as with the DMCA and little possibility of a damages award being made for a wrongful or incorrect takedown\(^2\). There seems little doubt that erroneous takedowns have occurred.

Article 15 of the 2000 Directive states that ISPs do not have an obligation “to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity”. It is therefore difficult to see how an ISP can carry out the balancing operation in relation to any alleged illegal content to determine if it is illegal, whether fair use or some other exemption might apply, or whether it should be removed\(^3\). It is easier to remove and wait for the uploader to object. However, with the cost of litigation that will rarely happen, even if well founded.

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\(^2\) In this regard, the DMCA provides that “a service provider shall not be liable to any person for any claim based on the service provider’s good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringed.” Digital Millennium Copyright Act, § 202, Pub. L. No. 105-304, 112 Stat. 2860, 17 U.S.C. § 512 (1998), at § (g)(1).

THE 2019 DIRECTIVE

The EU Copyright Directive comprising the Infosoc Directive 2000/31/EC of 8 June 2000\(^1\) discussed above and the earlier Directive 2001/29 EC\(^2\), which was enacted to give effect to the 1996 WIPO Treaties were perceived as no longer satisfactory for the digital market. In 2012 the European Commission announced that they would be reviewing the 2001 Directive and a long consultative and legislative process commenced which has resulted in the enactment in May 2019 of Directive 2019/790\(^3\). I do not propose to rehearse the long and very tortuous process to have the Directive passed, but an excellent summary can be found on Wikipedia\(^4\).

For the purposes of this paper, I shall only consider two provisions of the 2019 Directive, Articles 15 and 17 (11 and 13 in the final Draft).

Article 15 extends to publishers or press publications the right to control the online use of their press publications, published after 6 June 2019, by Information Society service providers. This does not apply to private or non-commercial uses of press publications by individual users. Individual words and very short extracts are not covered. This new right extends for a period of two years starting on 1\(^{st}\) January of the year after press publication.

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The other relevant provision is Article 17 of the Directive; perhaps the most controversial provision and very much the product of extensive lobbying by the content industry.

Article 17 provides that the making available of a copyright work by an online content-sharing service provider\(^1\) is an act of communication to the public; such an online content sharing service provider is therefore required to obtain an authorisation from the rightsholder in order to make the work available. The authorisation obtained by the service will cover the acts of users of the service provided these are not carried out on a commercial basis or where their activity does not generate significant revenues. If the online content sharing service provider has not obtained authorisation from the rightsholder, it will not be protected by liability by the hosting exemption in Article 14(1) of Directive 2000/31/EC (although the service may benefit from the exemption in respect of its other activities).

Article 17.4 provides that:

"If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, (emphasis added) unless the service providers demonstrate that they have:

(a) made best efforts to obtain an authorisation, and
(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject

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\(^1\) Defined in Article 2(6) as “a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

Providers of services, such as not-for-profit online encyclopaedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not ‘online content-sharing service providers’ within the meaning of this Directive."
matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b)."

In determining whether or not the content-sharing service has complied with its obligations under Article 17.4, there is to be taken into account:\[1\]:

(a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and

(b) the availability of suitable and effective means and their cost for service providers.

The difficulty, of course, for the online content-sharing service provider is that these points are only “to be taken into account”; they do not provide a save harbour for the service. There is no guarantee that liability will not still exist despite the good faith efforts of the provider.

There is a further partial exemption contained in Article 17.6, although it is very unclear how it would work; what will happen when the service passes the thresholds – either of 3 years or of €10m turnover – bearing in mind that in order to benefit from the partial exemption, both tests must be met. Therefore, a very successful service which achieved a €10m turnover in year 1 would face the full wrath of Article 17.4, and a poorly performing service with only €1m after 3 years would also be caught. “Best efforts” is a very high standard, at least in UK law and is not really a standard understood as such in many European jurisdictions in the same way; more than “reasonable efforts”, it remains a very subjective test.

\[1\] Article 17.5
“6. Member States shall provide that, in respect of new online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC (20), the conditions under the liability regime set out in paragraph 4 are limited to compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject matter or to remove those works or other subject matter from their websites.

Where the average number of monthly unique visitors of such service providers exceeds 5 million, calculated on the basis of the previous calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.”

The 2019 Directive provides that existing exemptions and limitations for such matters as quotation, criticism and review; caricature, parody and pastiche are to continue but the fear of many is that faced with the possibility of ISP liability, and through the use of automated takedown systems, many online content-sharing service providers will adopt a “shoot first, ask questions later” approach.

The risk is that Article 17 will have a chilling effect on online expression, including those protected characteristics in Article 17.6 as it could force web services to stop users uploading information unless they could prove prior authorisation; there is evidence that existing provisions in the EU and US have been used to seek to silence critics and whistle-blowers, without any real justification but working on the principle that defending against a claim is outwith the resources of many.

WHERE DO WE GO FROM HERE?

EU Member States must bring into force the laws, regulations and administrative provisions to comply with the 2019 Directive by June 7, 2021.
After June 7, 2026, the European Commission must conduct a review of the directive and produce a report. But before June 7, 2024, the Commission must assess the impact of the liability regime in Article 17 on online content-sharing service providers with an annual turnover under €10 million and take action if needed.

The European Parliament was tightly split over the Directive, ultimately voting 348 to 274 in favour. But only 19 governments supported the Directive; Italy, Sweden, Poland, Finland, the Netherlands and Luxembourg voted against it; Poland has brought a court challenge to the Directive on the grounds that it represents censorship and violates freedom of expression.\(^1\)

In his paper, “Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market”\(^2\), Professor Martin Senftleben, a law professor at Vrije University Amsterdam, stated:

“The new EU Directive on Copyright in the Digital Single Market creates a peculiar triangle of obligations to license, filter and privilege user-generated content (UGC),” the abstract to the paper states. “As it abolishes the traditional safe harbour for hosting in the case of copyrighted content, it may lead to the disappearance of the open, participative internet which EU citizens currently enjoy. To avoid the loss of open, democratic avenues for online content creation, national lawmakers will have to find the right amalgam of licensing and filtering obligations on the one hand, and new use privileges that offer room for user-generated content without prior authorization on the other.”

**POSTSCRIPT**

As I finished writing this my attention was drawn to a decision of the Italian Court of First Instance in Rome (Tribunale di Roma) of 25 July 2019 in Mediaset

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\(^1\) Poland v Parliament and Council, Case C-401/19; lodged 24/05/2019.

In that case the Court found a hosting provider (Dailymotion, largely owned by French media giant Vivendi) directly liable for the content uploaded to a platform by its users – nearly 1000 videos – which infringed Mediaset’s intellectual property rights under the provisions of the Electronic Commerce Directive 2000/31/EC as transposed into Italian law.

As will be recalled, the E-Commerce Directive in Article 14 provides an exemption from liability for hosting providers subject to certain conditions; lack of actual knowledge of the illegal activity or information and is not aware of facts or circumstances from which the illegal activity or information is apparent; or if the provider, upon obtaining such knowledge or awareness acts expeditiously to remove or to disable access to the information.

In the Mediaset case, the court considered that to benefit from the exemption, Dailymotion had to prove that it did not manage the content into special categories, nor that it generated advertising revenue from it or profiled the content via cookies. Of course, Dailymotion (as indeed most content-sharing sites) did categorise the information and was supported by advertising beside the videos. Therefore the exemption did not apply.

The Tribunale di Roma considered that damages should be calculated by reference to the cost to Dailymotion to have acquired a licence to use the content, having regard to the duration of time throughout which the material was visible, and fined Dailymotion over €5m.

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1 RG 24711-2012, decision 14757/2019 discussed at https://www.gtgadvocates.com/2528-2/. I am grateful to Dr Ian Gauci, Dr Terence Cassar and Dr Bernice Saliba of GTG Advocates in Malta for drawing this to my attention and providing an explanation in English.
The court also thought that Dailymotion must implement preventive filtering mechanisms to ensure that the infringement did not re-occur. This seems to run counter to the specific provisions of both the E-Commerce Directive and the 2019 Directive which expressly state that the Information Society Service Provider is not required to carry out monitoring.

The matter is unlikely to rest with the ruling of the Tribunal di Roma as it is to be expected that Dailymotion will lodge an appeal. Additionally, a request for a preliminary reference under Article 267 of the Treaty on the Functioning of the European Union\(^1\) was lodged against YouTube in November 2019, by the Bundesgerichtshof (German Supreme Court)\(^2\) with the main question put forward being:

> “Does the operator of an internet video platform on which videos containing content protected by copyright are made publicly accessible by users without the consent of the rightholders carry out an act of communication within the meaning of Article 3(1) of Directive 2001/29/EC if:

- the operator earns advertising revenue by means of the platform,
- the upload process takes place automatically and without material being seen in advance or controlled by the operator,
- in accordance with the conditions of use, the operator receives a worldwide, non-exclusive and royalty-free licence for the videos for the duration for which the videos are posted,
- in the conditions of use and during the upload process, the operator points out that copyright-infringing content may not be posted,
- the operator provides tools with which rightholders can take steps to block infringing videos,
- on the platform, the operator prepares search results in the form of rankings and content categories, and displays to registered users an overview that is oriented towards previously seen videos and that contains recommended videos which can be displayed to registered users,
- if the operator is not specifically aware of the availability of copyright-infringing

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\(^1\) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14552

\(^2\) Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 6 November 2018 — LF v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (Case C-682/18) (OJ 4 March 2019, C 82/03)
content or, after having become aware, expeditiously deletes that content or expeditiously disables access thereto?"1

Although a ruling in this case is being asked primarily in relation to the Copyright Directive, the request is also asking the Court of Justice of the European Union to determine whether YouTube’s actions fall within the scope of Article 14 of the E-Commerce Directive and whether, consequently, YouTube should be deemed liable for the content uploaded by its users.

Depending on the ruling by the Court of Justice, the Italian case may be seen as a prescient decision or an aberration but, either way, the position may become clearer2.

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Materials:

i) Directive 98/34/EC;

ii) Directive 98/48/EC;

iii) Directive 2000/31/EC;


v) Directive (EU) 2019/790;

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1 There are several subsidiary questions which follow on from the answer to this question.

2 The case is at a very early stage and there is no indication on the Court website of when it may progress. [http://curia.europa.eu/juris/liste.jsf?num=C-682/18&language=en](http://curia.europa.eu/juris/liste.jsf?num=C-682/18&language=en)
DIRECTIVE 98/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 20 July 1998

amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 100a and 213 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3),

(1) Whereas, in order to promote the smooth functioning of the internal market, as much transparency as possible should be ensured as regards the future national rules and regulations applying to Information Society services, by amending Directive 98/34/EC (4);

(2) Whereas a wide variety of services within the meaning of Articles 59 and 60 of the Treaty will benefit by the opportunities afforded by the Information Society of being provided at a distance, electronically and at the individual request of a recipient of services;

(3) Whereas the area without internal frontiers comprising the internal market enables providers of such services to develop their cross-border activities with a view to increasing their competitiveness, and thus affords citizens new opportunities to transmit and receive information regardless of frontiers, and consumers new forms of access to goods and services;

(4) Whereas the extension of the scope of Directive 98/34/EC should not prevent Member States from taking account of the different social, societal and cultural implications inherent in the advent of the Information Society; whereas, in particular, the use of the procedural rules laid down in that Directive for Information Society services should not affect cultural policy measures, particularly in the audiovisual field, which Member States might adopt in accordance with Community law, taking account of their linguistic diversity, their specific national and regional characteristics and their cultural heritage; whereas the development of the Information Society should ensure, in any event, proper access of European citizens to the European cultural heritage supplied in a digital environment;

(5) Whereas Directive 98/34/EC is not intended to apply to national rules relating to fundamental rights, such as constitutional provisions concerning freedom of expression and, more particularly, freedom of the press; whereas it is not intended to apply to the general criminal law either; whereas, furthermore, it does not apply to agreements governed by private law between credit institutions, in particular, to agreements on the execution of payments between credit institutions;

(6) Whereas the European Council has stressed the need to create a clear and stable legal framework at Community level in order to foster the development of the Information Society; whereas Community law and the rules governing the internal market in particular, including both the principles enshrined in the Treaty and secondary legislation, already constitute a basic legal framework for the development of such services;

(7) Whereas it should be possible to adapt the existing national rules and regulations applicable to services available at the present so as to take account of new Information Society services, either with a view to ensuring that the general interest is better protected or, on the other hand, with a view to simplifying such rules and regulations where their application is disproportionate to the objectives they pursue;

(8) Whereas, without coordination at Community level, this foreseeable regulatory activity at national level might give rise to restrictions on the free movement of services and the freedom of establishment, leading in turn to a refragmentation of the internal market, over-regulation and regulatory inconsistencies;

(9) Whereas, in order to ensure real and effective protection of the general-interest objectives involved in the development of the Information Society, there is a

need for a coordinated approach at Community level when questions relating to activities with such highly transnational connotations as those of the new services are dealt with;

(10) Whereas, in the case of telecommunications services, there is already harmonisation at Community level or, in some cases, arrangements for mutual recognition, and whereas the existing Community legislation provides for adaptations to take account of technological developments and the supply of new services and, as a result, the majority of national regulations concerning telecommunications services will not be subject to notification under this Directive since they will come under the exemptions set out in Article 10(1) or Article 1 point 5 of Directive 98/34/EC; whereas, nevertheless, certain national provisions specifically aimed at matters which are not subject to Community legislation may affect the free movement of Information Society services and to that extent they must be notified;

(11) Whereas, for the other still little known fields of the Information Society, it would, however, be premature to coordinate national rules and regulations by means of extensive or exhaustive harmonisation at Community level of the substantive law, given that enough is not yet known about the form the new services will take or their nature, that there is as yet at national level no specific regulatory activity in this field, and that the need for, and content of, such harmonisation in the light of the internal market cannot be defined at this stage;

(12) Whereas it is therefore necessary to preserve the smooth functioning of the internal market and to avert the risks of refragmentation by providing for a procedure for the provision of information, the holding of consultations, and administrative cooperation in respect of new draft rules and regulations; whereas such a procedure will help, inter alia, to ensure that the Treaty, in particular Articles 52 and 59 thereof, is effectively applied and, where necessary, to detect any need to protect the general interest at Community level; whereas, moreover, the improved application of the Treaty made possible by such an information procedure will have the effect of reducing the need for Community rules to what is strictly necessary and proportional in the light of the internal market and the protection of general-interest objectives; whereas, lastly, such a procedure will enable businesses to exploit the advantages of the internal market more effectively;

(13) Whereas Directive 98/34/EC pursues the same objectives and whereas this procedure is effective, being the most comprehensive one for attaining these objectives; whereas the experience that has been gained in implementing that Directive and the procedures provided for therein can be applied to draft rules on Information Society services; whereas the procedure it lays down is now well established among national authorities;

(14) Whereas, moreover, in accordance with Article 7a of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured and whereas Directive 98/34/EC provides only for an administrative cooperation procedure and not for any harmonisation of substantive rules;

(15) Whereas, therefore, amendment of Directive 98/34/EC with a view to applying it to draft rules and regulations on Information Society services is the approach best suited, with regard to the legal framework of the said services, to meeting effectively the need for transparency in the internal market;

(16) Whereas notification should be provided for notably in the case of rules which are likely to evolve in future; whereas services which are provided at a distance, electronically, and at the individual request of the recipient of services (Information Society services) are likely, in view of their diversity and their future growth, to necessitate and generate the largest number of new rules and regulations; whereas provision must accordingly be made for the notification of draft rules and regulations relating to such services;

(17) Whereas specific rules on the taking-up and pursuit of service activities which are capable of being carried on in the manner described above should thus be communicated even where they are included in rules and regulations with a more general purpose; whereas, however, general regulations which do not contain any provision specifically aimed at such services need not be notified;

(18) Whereas ‘rules on the taking-up and pursuit of service activities’ means rules laying down requirements concerning Information Society services, such as those relating to service providers, services and recipients of services and to economic activities capable of being provided electronically, at a distance and at the individual request of the recipient of the services; whereas, for example, rules on the establishment of service providers, in particular those on authorisation or licensing arrangements, are accordingly covered; whereas a provision specifically aimed at Information Society services must be con-
sidered as being such a rule even if part of a more
general regulation; whereas, on the other hand,
measures of direct and individual concern to certain
specific recipients (such as, for example, telecommu-
nications licences) would not be covered;

(19) Whereas, under Article 60 of the Treaty as inter-
preted by the case-law of the Court of Justice, ‘ser-
vices’ means those normally provided for remun-
eration; whereas that characteristic is absent in the
case of activities which a State carries out without
economic consideration in the context of its duties
in particular in the social, cultural, educational and
judicial fields; whereas national provisions con-
cerning such activities are not covered by the defini-
tion given in Article 60 of the Treaty and therefore
do not fall within the scope of this Directive;

(20) Whereas this Directive is without prejudice to the
1989 on the coordination of certain provisions laid
down by law, regulation or administrative action in
Member States concerning the pursuit of television
broadcasting activities (1), as amended by Directive
97/36/EC of the European Parliament and of the
Council (2), or any future amendments;

(21) Whereas, in any event, this Directive does not cover
draft national provisions aimed at transposing the
content of Community directives in force or awaiting
adoption inasmuch as they are already subject to
specific examination; whereas it accordingly covers
neither national rules and regulations transposing
Directive 89/552/EEC, as amended by Directive
97/36/EC, nor any future amendments, nor national
rules and regulations transposing, or adopted subse-
quently within the context of, Directive 97/13/EC of
the European Parliament and of the Council of 10
April 1997 on a common framework for general
authorisations and individual licences for telecom-
munications services (3);

(22) Whereas, moreover, provision should be made for
exceptional cases in which national rules and regula-
tions concerning Information Society services might
be adopted immediately and whereas it is also
important to allow this possibility solely for urgent
reasons linked to serious and unforeseeable circum-
stances, such as circumstances of which there was no
previous knowledge and the origin of which is not
attributable to any action on the part of the author-
ies of the Member State concerned, so as not to
jeopardize the objective of prior consultation and
administrative cooperation inherent in this Directive;

(23) Whereas it is appropriate for a Member State to post-
pone for twelve months — or possibly eighteen
months in the case of a common position of the
Council — the adoption of a draft rule on services
only where the draft rule relates to a matter which
falls within the scope of a proposal for a directive,
regulation or decision which the Commission has
already submitted to the Council; whereas this stand-
still obligation may be imposed by the Commission
on the relevant Member State only if the draft
national rule contains provisions which are not
substantively consistent with the proposal submitted
by the Commission;

(24) Whereas definition of the framework for the provi-
sion of information and the holding of consultations
at Community level as established by this Directive
is a precondition for consistent and effective parti-
cipation by the Community in work involving
matters relating to the regulatory aspects of Informa-
tion Society services in the international context;

(25) Whereas it is appropriate that, in the context of the
functioning of Directive 98/34/EC, the Committee
provided for in Article 5 thereof should meet specifi-
cally to examine questions relating to Information
Society services;

(26) Whereas, by the same token, it should be noted that
whenever a national measure is required also to be
notified at the draft stage under another Community
act, the Member State concerned may make a single
communication under that other act, by indicating
that that communication constitutes a communica-
tion also for the purpose of this Directive;

(27) Whereas the Commission will at regular intervals
investigate developments in the market for new
services in the field of the Information Society, es-
specially in the framework of the convergence
between telecommunications, information techno-
logy and media and, where necessary, take initiatives
in order to adapt rules promptly in order to en-
courage the European development of new services,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 98/34/EC is amended as follows:

1. the title shall be replaced by the following:

‘Directive of the European Parliament and of the
Council laying down a procedure for the provision of
information in the field of technical standards and
regulations and of rules on Information Society ser-
vices’;

2. Article 1 is amended as follows:

(a) the following new point shall be inserted:

'2. "service", any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

— "at a distance" means that the service is provided without the parties being simultaneously present,

— "by electronic means" means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,

— "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

This Directive shall not apply to:

— radio broadcasting services,

— television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC (*)


(b) points 2 and 3 shall become points 3 and 4 respectively;

(c) the following new point shall be inserted:

'5. "rule on services", requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

This Directive shall not apply to rules relating to matters which are covered by Community legislation in the field of financial services, as listed non-exhaustively in Annex VI to this Directive.

With the exception of Article 8(3), this Directive shall not apply to rules enacted by or for regulated markets within the meaning of Directive 93/22/EEC or by or for other markets or bodies carrying out clearing or settlement functions for those markets.

For the purposes of this definition:

— a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner,

— a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner.


(d) points 4 to 8 shall become points 6 to 10;

(e) point 9 shall be renumbered 11 and shall read as follows:

'11. "technical regulation", technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

De facto technical regulations include:

— laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,
— voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications,

— technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.

This comprises technical regulations imposed by the authorities designated by the Member States and appearing on a list to be drawn up by the Commission before 5 August 1999 (*), in the framework of the Committee referred to in Article 5.

The same procedure shall be used for amending this list;

(f) point 10 shall be renumbered 12 and the first subparagraph shall read as follows:

'12. "draft technical regulation", the text of a technical specification or other requirement or of a rule on services, including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made;'

3. Article 6 shall be amended as follows:

(a) the following subparagraph shall be added to paragraph 1:

'The Committee shall meet in a specific composition to examine questions concerning Information Society services;'

(b) the following paragraph shall be added:

'8. With respect to rules on services, the Commission and the Committee may consult natural or legal persons from industry or academia, and where possible representative bodies, capable of delivering an expert opinion on the social and societal aims and consequences of any draft rule on services, and take notice of their advice whenever requested to do so;'

4. The sixth subparagraph of Article 8(1) shall be replaced by the following:

'With respect to the technical specifications or other requirements or rules on services referred to in the third indent of the second subparagraph of point 11 of Article 1, the comments or detailed opinions of the Commission or Member States may concern only aspects which may hinder trade or, in respect of rules on services, the free movement of services or the freedom of establishment of service operators and not the fiscal or financial aspects of the measure;'

5. Article 9 shall be amended as follows:

(a) Paragraphs 2 and 3 shall be replaced by the following:

'2. Member States shall postpone:

— for four months the adoption of a draft technical regulation in the form of a voluntary agreement within the meaning of the second indent of the second subparagraph of point 11 of Article 1,

— without prejudice to paragraphs 3, 4 and 5, for six months the adoption of any other draft technical regulation (except for draft rules on services), from the date of receipt by the Commission of the communication referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of goods within the internal market;

— without prejudice to paragraphs 4 and 5, for four months the adoption of any draft rule on services, from the date of receipt by the Commission of the communication referred to in Article 8(1) if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of services or to the freedom of establishment of service operators within the internal market.

With regard to draft rules on services, detailed opinions from the Commission or Member States may not affect any cultural policy measures, in particular in the audiovisual sphere, which Member States might adopt in accordance with Community law, taking account of their linguistic diversity, their specific national and regional characteristics and their cultural heritage.'
The Member State concerned shall report to the Commission on the action it proposes to take on such detailed opinions. The Commission shall comment on this reaction.

With respect to rules on services, the Member State concerned shall indicate, where appropriate, the reasons why the detailed opinions cannot be taken into account.

3. With the exclusion of draft rules relating to services, Member States shall postpone the adoption of a draft technical regulation for twelve months from the date of receipt by the Commission of the communication referred to in Article 8(1) if, within three months of that date, the Commission announces its intention of proposing or adopting a directive, regulation or decision on the matter in accordance with Article 189 of the Treaty.

(b) Paragraph 7 shall be replaced by the following:

"7. Paragraphs 1 to 5 shall not apply in cases where:

— for urgent reasons, occasioned by serious and unforeseeable circumstances relating to the protection of public health or safety, the protection of animals or the preservation of plants, and for rules on services, also for public policy, notably the protection of minors, a Member State is obliged to prepare technical regulations in a very short space of time in order to enact and introduce them immediately without any consultations being possible or

— for urgent reasons occasioned by serious circumstances relating to the protection of the security and the integrity of the financial system, notably the protection of depositors, investors and insured persons, a Member State is obliged to enact and implement rules on financial services immediately.

In the communication referred to in Article 8, the Member State shall give reasons for the urgency of the measures taken. The Commission shall give its views on the communication as soon as possible. It shall take appropriate action in cases where improper use is made of this procedure. The European Parliament shall be kept informed by the Commission;"

6. Article 10 shall be amended as follows:

(a) the first and second indents of paragraph 1 shall be replaced by the following:

"— comply with binding Community acts which result in the adoption of technical specifications or rules on services,

— fulfil the obligations arising out of international agreements which result in the adoption of common technical specifications or rules on services in the Community;"

(b) the sixth indent of paragraph 1 shall be replaced by the following:

"— restrict themselves to amending a technical regulation within the meaning of point 11 of Article 1, in accordance with a Commission request, with a view to removing an obstacle to trade or, in the case of rules on services, to the free movement of services or the freedom of establishment of service operators;"

(c) paragraphs 3 and 4 shall be replaced by the following:

"3. Paragraphs 3 to 6 of Article 9 shall not apply to the voluntary agreements referred to in the second indent of the second subparagraph of point 11 of Article 1.

4. Article 9 shall not apply to the technical specifications or other requirements or the rules on services referred to in the third indent of the second subparagraph of point 11 of Article 1;"

7. Annexes V and VI, which appear in the Annex to this Directive, shall be added.

**Article 2**

1. Member States shall bring into force the regulations and administrative provisions necessary in order to comply with this Directive by 5 August 1999. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate the main provisions of national law which they adopt in the field covered by this Directive to the Commission.

**Article 3**

Not later than two years from the date referred to in the first subparagraph of Article 2(1), the Commission shall submit to the European Parliament and the Council an evaluation of the application of Directive 98/34/EC in particular in the light of technological and market developments for the services referred to in point 2 of Article 1. Not later than three years from the date referred to in the first subparagraph of Article 2(1), the Commission shall, if necessary, make proposals to the European Parliament and to the Council for a revision of the said Directive.

To this end, the Commission shall take into account any observations that might be communicated to it by Member States.
Article 4

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 5

This Directive is addressed to the Member States.


*For the European Parliament*  
*The President*  
J.M. GIL-ROBLES  

*For the Council*  
*The President*  
W. MOLTERER
ANNEX

ANNEX V

Indicative list of services not covered by the second subparagraph of point 2 of Article 1

1. Services not provided “at a distance”
   Services provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices
   (a) medical examinations or treatment at a doctor’s surgery using electronic equipment where the patient is physically present;
   (b) consultation of an electronic catalogue in a shop with the customer on site;
   (c) plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers;
   (d) electronic games made available in a video-arcade where the customer is physically present.

2. Services not provided “by electronic means”
   — Services having material content even though provided via electronic devices:
     (a) automatic cash or ticket dispensing machines (banknotes, rail tickets);
     (b) access to road networks, car parks, etc., charging for use, even if there are electronic devices at the entrance/exit controlling access and/or ensuring correct payment is made,
   — Off-line services: distribution of CD roms or software on diskettes,
   — Services which are not provided via electronic processing/inventory systems:
     (a) voice telephony services;
     (b) telefax/telex services;
     (c) services provided via voice telephony or fax;
     (d) telephone/telefax consultation of a doctor;
     (e) telephone/telefax consultation of a lawyer;
     (f) telephone/telefax direct marketing.

3. Services not supplied “at the individual request of a recipient of services”
   Services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission):
   (a) television broadcasting services (including near-video on-demand services), covered by point (a) of Article 1 of Directive 89/552/EEC;
   (b) radio broadcasting services;
   (c) (televised) teletext.
ANNEX VI

Indicative list of the financial services covered by the third subparagraph of point 5 of Article 1

— Investment services
— Insurance and reinsurance operations
— Banking services
— Operations relating to pension funds
— Services relating to dealings in futures or options

Such services include in particular:

(a) investment services referred to in the Annex to Directive 93/22/EEC (1); services of collective investment undertakings,

(b) services covered by the activities subject to mutual recognition referred to in the Annex to Directive 89/646/EEC (2),

(c) operations covered by the insurance and reinsurance activities referred to in:
— Article 1 of Directive 73/239/EEC (3),
— the Annex to Directive 79/267/EEC (4),
— Directive 64/225/EEC (5),
— Directives 92/49/EEC (6) and 92/96/EEC (7).

I

(Acts whose publication is obligatory)

DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 8 June 2000

on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty (3),

Whereas:

(1) The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; in accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movements of goods, services and the freedom of establishment are ensured; the development of information society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples.

(2) The development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry, provided that everyone has access to the Internet.

(3) Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; this Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services.

(4) It is important to ensure that electronic commerce could fully benefit from the internal market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (4), a high level of Community integration is achieved.

(5) The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State.

(1) OJ C 30, 5.2.1999, p. 4.
(2) OJ C 169, 16.6.1999, p. 36.
In the light of Community objectives, of Articles 43 and 49 of the Treaty and of secondary Community law, these obstacles should be eliminated by coordinating certain national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty.

In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.

The objective of this Directive is to create a legal framework to ensure the free movement of information society services between Member States and not to harmonise the field of criminal law as such.

The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.

In accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market; where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as electronic commerce is concerned, the Directive must ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity, consumer protection and the protection of public health; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies.

This Directive is without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts; amongst others, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts form a vital element of national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty.

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The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.

In accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market; where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as electronic commerce is concerned, the Directive must ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity, consumer protection and the protection of public health; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies.

This Directive is without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts; amongst others, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts form a vital element of national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty.

In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.

The objective of this Directive is to create a legal framework to ensure the free movement of information society services between Member States and not to harmonise the field of criminal law as such.

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should be without prejudice to Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (1) adopted within the framework of the internal market, or to directives on the protection of public health; this Directive complements information requirements established by the abovementioned Directives and in particular Directive 97/7/EC.

(12) It is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage, be guaranteed under the Treaty or existing secondary legislation; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; taxation, particularly value added tax imposed on a large number of the services covered by this Directive, must be excluded form the scope of this Directive.

(13) This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce.

(14) The protection of individuals with regard to the processing of personal data is solely governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (2) and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (3) which are fully applicable to information society services; these Directives already establish a Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive in order to ensure the smooth functioning of the internal market, in particular the free movement of personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet.

(15) The confidentiality of communications is guaranteed by Article 5 Directive 97/66/EC; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised.

(16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.

(17) The definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services (4) and in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (5); this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition.

(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an

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employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

(19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.

(20) The definition of ‘recipient of a service’ covers all types of usage of information society services, both by persons who provide information on open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons.

(21) The scope of the coordinated field is without prejudice to future Community harmonisation relating to information society services and to future legislation adopted at national level in accordance with Community law; the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member States’ legal requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member States’ requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; the coordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art.

(22) Information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established.

(23) This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.

(24) In the context of this Directive, notwithstanding the rule on the control at source of information society services, it is legitimate under the conditions established in this Directive for Member States to take measures to restrict the free movement of information society services.

(25) National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in this Directive.

(26) Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission.

(27) This Directive, together with the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services, contributes to the creating of a legal framework for the on-line provision of financial services; this Directive does not pre-empt future initiatives in the area of financial services in particular with regard to the harmonisation of rules of conduct in this field; the possibility for Member States, established in this Directive, under certain circumstances of restricting the freedom to provide information society services in order to protect consumers also covers measures in the area of financial services in particular measures aiming at protecting investors.
(28) The Member States' obligation not to subject access to the activity of an information society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (1) consisting of the physical delivery of a printed electronic mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification service.

(29) Commercial communications are essential for the financing of information society services and for developing a wide variety of new, charge-free services; in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements; these requirements are without prejudice to Directive 97/7/EC; this Directive should not affect existing Directives on commercial communications, in particular Directive 98/43/EC.

(30) The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and information society service providers and may disrupt the smooth functioning of interactive networks; the question of consent by recipient of certain forms of unsolicited commercial communications is not addressed by this Directive, but has already been addressed, in particular, by Directive 97/7/EC and by Directive 97/66/EC; in Member States which authorise unsolicited commercial communications by electronic mail, the setting up of appropriate industry filtering initiatives should be encouraged and facilitated; in addition it is necessary that in any event unsolicited commercial communities are clearly identifiable as such in order to improve transparency and to facilitate the functioning of such industry initiatives; unsolicited commercial communications by electronic mail should not result in additional communication costs for the recipient.

(31) Member States which allow the sending of unsolicited commercial communications by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

(32) In order to remove barriers to the development of cross-border services within the Community which members of the regulated professions might offer on the Internet, it is necessary that compliance be guaranteed at Community level with professional rules aiming, in particular, to protect consumers or public health; codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; the drawing-up or, where appropriate, the adaptation of such rules should be encouraged without prejudice to the autonomy of professional bodies and associations.

(33) This Directive complements Community law and national law relating to regulated professions maintaining a coherent set of applicable rules in this field.

(34) Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means; the examination of the legislation requiring such adjustment should be systematic and should cover all the necessary stages and acts of the contractual process, including the filing of the contract; the result of this amendment should be to make contracts concluded electronically workable; the legal effect of electronic signatures is dealt with by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures (2); the acknowledgement of receipt by a service provider may take the form of the on-line provision of the service paid for.

(35) This Directive does not affect Member States' possibility of maintaining or establishing general or specific legal requirements for contracts which can be fulfilled by electronic means, in particular requirements concerning secure electronic signatures.

(36) Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts, public authorities, or professions exercising public authority; this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have an effect with regard to third parties as well as contracts requiring by law certification or attestation by a notary.

(37) Member States' obligation to remove obstacles to the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility of using electronic means in certain cases.

(38) Member States' obligation to remove obstacles to the use of electronic contracts is to be implemented in conformity with legal requirements for contracts enshrined in Community law.

(39) The exceptions to the provisions concerning the contracts concluded exclusively by electronic mail or by equivalent individual communications provided for by this Directive, in relation to information to be provided and the placing of orders, should not enable, as a result, the by-passing of those provisions by providers of information society services.

(40) Both existing and emerging disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition; service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures; the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC.

(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for 'mere conduit' and for 'caching' when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of 'mere conduit' or 'caching' and as a result cannot benefit from the liability exemptions established for these activities.

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

(49) Member States and the Commission are to encourage the drawing-up of codes of conduct; this is not to impair the voluntary nature of such codes and the possibility for interested parties of deciding freely whether to adhere to such codes.
(50) It is important that the proposed directive on the harmonisation of certain aspects of copyright and related rights in the information society and this Directive come into force within a similar time scale with a view to establishing a clear framework of rules relevant to the issue of liability of intermediaries for copyright and relating rights infringements at Community level.

(51) Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders.

(52) The effective exercise of the freedoms of the internal market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extent; in view of this specific character and the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, this Directive requests Member States to ensure that appropriate court actions are available; Member States should examine the need to provide access to judicial procedures by appropriate electronic means.

(53) Directive 98/27/EC, which is applicable to information society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; this mechanism will contribute to the free movement of information society services by ensuring a high level of consumer protection.

(54) The sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive.

(55) This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.

(56) As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract.

(57) The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State.

(58) This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, Uncitral) on legal issues.

(59) Despite the global nature of electronic communications, coordination of national regulatory measures at European Union level is necessary in order to avoid fragmentation of the internal market, and for the establishment of an appropriate European regulatory framework; such coordination should also contribute to the establishment of a common and strong negotiating position in international forums.

(60) In order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector.

(61) If the market is actually to operate by electronic means in the context of globalisation, the European Union and the major non-European areas need to consult each other with a view to making laws and procedures compatible.

(62) Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union’s other trading partners.
(63) The adoption of this Directive will not prevent the Member States from taking into account the various social, societal and cultural implications which are inherent in the advent of the information society; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of information society services; in any case, the development of the information society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment.

(64) Electronic communication offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields.

(65) The Council, in its resolution of 19 January 1999 on the consumer dimension of the information society, stressed that the protection of consumers deserved special attention in this field; the Commission will examine the degree to which existing consumer protection rules provide insufficient protection in the context of the information society and will identify, where necessary, the deficiencies of this legislation and those issues which could require additional measures; if need be, the Commission should make specific additional proposals to resolve such deficiencies that will thereby have been identified.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Objective and scope

1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

5. This Directive shall not apply to:

(a) the field of taxation;
(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;
(c) questions relating to agreements or practices governed by cartel law;
(d) the following activities of information society services:
   — the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,
   — the representation of a client and defence of his interests before the courts,
   — gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

6. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

Article 2

Definitions

For the purpose of this Directive, the following terms shall bear the following meanings:

(a) 'information society services': services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

(b) ‘service provider’: any natural or legal person providing an information society service;

(c) ‘established service provider’: a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;

(d) ‘recipient of the service’: any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;

(e) ‘consumer’: any natural person who is acting for purposes which are outside his or her trade, business or profession;

(f) ‘commercial communication’: any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not in themselves constitute commercial communications:

— information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,

— communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration;


(h) ‘coordinated field’: requirements laid down in Member States’ legal systems applicable to information society services or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

— the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,

— the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;

(ii) The coordinated field does not cover requirements such as:

— requirements applicable to goods as such,

— requirements applicable to the delivery of goods,

— requirements applicable to services not provided by electronic means.

Article 3

Internal market

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

— public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

— the protection of public health,

— public security, including the safeguarding of national security and defence,
— the protection of consumers, including investors;
(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;
(iii) proportionate to those objectives;
(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:
— asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,
— notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.
5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.
6. Without prejudice to the Member State’s possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4

Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

Article 5

General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;
(b) the geographic address at which the service provider is established;
(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
(f) as concerns the regulated professions:
— any professional body or similar institution with which the service provider is registered,
— the professional title and the Member State where it has been granted,
— a reference to the applicable professional rules in the Member State of establishment and the means to access them;
(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (1).

In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2: Commercial communications

Article 6

Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

(a) the commercial communication shall be clearly identifiable as such;
(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;
(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;
(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

Article 7

Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient.

2. Without prejudice to Directive 97/7/EC and Directive 97/66/EC, Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

Article 8

Regulated professions

1. Member States shall ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, Member States and the Commission shall encourage professional associations and bodies to establish codes of conduct at Community level in order to determine the types of information that can be given for the purposes of commercial communication in conformity with the rules referred to in paragraph 1.

3. When drawing up proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close cooperation with the relevant professional associations and bodies.

4. This Directive shall apply in addition to Community Directives concerning access to, and the exercise of, activities of the regulated professions.

Section 3: Contracts concluded by electronic means

Article 9

Treatment of contracts

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that they set up procedures to make contracts to be concluded by electronic means identifiable clearly and unambiguously as such as soon as they are received by the recipient.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

(a) contracts that create or transfer rights in real estate, except for rental rights;
(b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

(c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

(d) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

Article 10

Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

(a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

(c) the technical means for identifying and correcting input errors prior to the placing of the order;

(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Article 11

Placing of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

— the service provider has to acknowledge the receipt of the recipient’s order without undue delay and by electronic means,

— the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 4: Liability of intermediary service providers

Article 12

‘Mere conduit’

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

(a) does not initiate the transmission;

(b) does not select the receiver of the transmission; and

(c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.
3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13

‘Caching’

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 15

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

CHAPTER III

IMPLEMENTATION

Article 16

Codes of conduct

1. Member States and the Commission shall encourage:

(a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(c) the accessibility of these codes of conduct in the Community languages by electronic means;
(d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce;

(e) the drawing up of codes of conduct regarding the protection of minors and human dignity.

2. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1(a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

Article 19

Cooperation

1. Member States shall have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall cooperate with other Member States; they shall, to that end, appoint one or several contact points, whose details they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms;

(b) obtain the details of authorities, associations or organisations from which they may obtain further information or practical assistance.

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to information society services and practices, usages or customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

Article 20

Sanctions

Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive.
CHAPTER IV

FINAL PROVISIONS

Article 22

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 17 January 2002. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

Article 21

Re-examination

1. Before 17 July 2003, and thereafter every two years, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of information society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the internal market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, ‘notice and take down’ procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail.

Article 23

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 24

Addressees

This Directive is addressed to the Member States.

Done at Luxemburg, 8 June 2000.

For the European Parliament

For the Council

The President

N. Fontaine

G. d’Oliveira Martins
ANNEX

DEROGATIONS FROM ARTICLE 3

As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

— copyright, neighbouring rights, rights referred to in Directive 87/54/EEC (1) and Directive 96/9/EC (2) as well as industrial property rights,

— the emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in Article 8(1) of Directive 2000/46/EC (3),

— Article 44(2) of Directive 85/611/EEC (4),


— the freedom of the parties to choose the law applicable to their contract,

— contractual obligations concerning consumer contacts,

— formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated,

— the permissibility of unsolicited commercial communications by electronic mail.

(3) Not yet published in the Official Journal.
DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 17 April 2019

on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Articles 62 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee (1),

Having regard to the opinion of the Committee of the Regions (2),

Acting in accordance with the ordinary legislative procedure (3),

Whereas:

(1) The Treaty on European Union (TEU) provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Further harmonisation of the laws of the Member States on copyright and related rights should contribute to the achievement of those objectives.

(2) The directives that have been adopted in the area of copyright and related rights contribute to the functioning of the internal market, provide for a high level of protection for rightholders, facilitate the clearance of rights, and create a framework in which the exploitation of works and other protected subject matter can take place. That harmonised legal framework contributes to the proper functioning of the internal market, and stimulates innovation, creativity, investment and production of new content, also in the digital environment, in order to avoid the fragmentation of the internal market. The protection provided by that legal framework also contributes to the Union’s objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore. Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action.

(3) Rapid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. Relevant legislation needs to be future-proof so as not to restrict technological development. The objectives and the principles laid down by the Union copyright framework remain sound. However, legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other subject matter in the digital environment. As stated in the Commission Communication of 9 December 2015 entitled ‘Towards a modern, more European copyright framework’, in some areas it is necessary to adapt and supplement the existing Union copyright framework, while keeping a high level of protection of copyright and related rights. This Directive provides for rules to adapt certain exceptions and limitations to copyright and related rights to digital and cross-border environments, as well as for measures to facilitate certain licensing practices, in particular, but not only, as regards the dissemination of out-of-commerce works and other subject matter and the online availability of audiovisual works on video-on-demand platforms, with a view to ensuring wider access to content. It also contains rules to facilitate the use of content in the public domain. In order to achieve a well-functioning and fair marketplace for copyright, there should also be rules on rights in publications, on the use of works

(1) OJ C 125, 21.4.2017, p. 27.
or other subject matter by online service providers storing and giving access to user-uploaded content, on the transparency of authors’ and performers’ contracts, on authors’ and performers’ remuneration, as well as a mechanism for the revocation of rights that authors and performers have transferred on an exclusive basis.

(4) This Directive is based upon, and complements, the rules laid down in the directives currently in force in this area, in particular Directives 96/9/EC (1), 2000/31/EC (2), 2001/29/EC (3), 2006/115/EC (6), 2009/24/EC (8), 2012/82/EU (7) and 2014/26/EU (10) of the European Parliament and of the Council.

(5) In the fields of research, innovation, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the existing Union rules on exceptions and limitations. In addition, the optional nature of exceptions and limitations provided for in Directives 96/9/EC, 2001/29/EC and 2009/24/EC in those fields could negatively impact the functioning of the internal market. This is particularly relevant as regards cross-border uses, which are becoming increasingly important in the digital environment. Therefore, the existing exceptions and limitations in Union law that are relevant for scientific research, innovation, teaching and preservation of cultural heritage should be reassessed in the light of those new uses. Mandatory exceptions or limitations for uses of text and data mining technologies, illustration for teaching in the digital environment and for preservation of cultural heritage should be introduced. The existing exceptions and limitations in Union law should continue to apply, including to text and data mining, education, and preservation activities, as long as they do not limit the scope of the mandatory exceptions or limitations provided for in this Directive, which need to be implemented by Member States in their national law. Directives 96/9/EC and 2001/29/EC should, therefore, be amended.

(6) The exceptions and limitations provided for in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders, on the one hand, and of users on the other. They can be applied only in certain special cases that do not conflict with the normal exploitation of the works or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholders.

(7) The protection of technological measures established in Directive 2001/29/EC remains essential to ensure the protection and the effective exercise of the rights granted to authors and to other rightholders under Union law. Such protection should be maintained while ensuring that the use of technological measures does not prevent the enjoyment of the exceptions and limitations provided for in this Directive. Rightholders should have the opportunity to ensure that through voluntary measures. They should remain free to choose the appropriate means of enabling the beneficiaries of the exceptions and limitations provided for in this Directive to benefit from them. In the absence of voluntary measures, Member States should take appropriate measures in accordance with the first subparagraph of Article 6(4) of Directive 2001/29/EC, including where works and other subject matter are made available to the public through on-demand services.

(8) New technologies enable the automated computational analysis of information in digital form, such as text, sounds, images or data, generally known as text and data mining. Text and data mining makes the processing of large amounts of information with a view to gaining new knowledge and discovering new trends possible. Text and data mining technologies are prevalent across the digital economy; however, there is widespread acknowledgment that text and data mining can, in particular, benefit the research community and, in so doing, support

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innovation. Such technologies benefit universities and other research organisations, as well as cultural heritage institutions since they could also carry out research in the context of their main activities. However, in the Union, such organisations and institutions are confronted with legal uncertainty as to the extent to which they can perform text and data mining of content. In certain instances, text and data mining can involve acts protected by copyright, by the sui generis database right or by both, in particular, the reproduction of works or other subject matter, the extraction of contents from a database or both which occur for example when the data are normalised in the process of text and data mining. Where no exception or limitation applies, an authorisation to undertake such acts is required from rightholders.

(9) Text and data mining can also be carried out in relation to mere facts or data that are not protected by copyright, and in such instances no authorisation is required under copyright law. There can also be instances of text and data mining that do not involve acts of reproduction or where the reproductions made fall under the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC, which should continue to apply to text and data mining techniques that do not involve the making of copies beyond the scope of that exception.

(10) Union law provides for certain exceptions and limitations covering uses for scientific research purposes which may apply to acts of text and data mining. However, those exceptions and limitations are optional and not fully adapted to the use of technologies in scientific research. Moreover, where researchers have lawful access to content, for example through subscriptions to publications or open access licences, the terms of the licences could exclude text and data mining. As research is increasingly carried out with the assistance of digital technology, there is a risk that the Union’s competitive position as a research area will suffer, unless steps are taken to address the legal uncertainty concerning text and data mining.

(11) The legal uncertainty concerning text and data mining should be addressed by providing for a mandatory exception for universities and other research organisations, as well as for cultural heritage institutions, to the exclusive right of reproduction and to the right to prevent extraction from a database. In line with the existing Union research policy, which encourages universities and research institutes to collaborate with the private sector, research organisations should also benefit from such an exception when their research activities are carried out in the framework of public-private partnerships. While research organisations and cultural heritage institutions should continue to be the beneficiaries of that exception, they should also be able to rely on their private partners for carrying out text and data mining, including by using their technological tools.

(12) Research organisations across the Union encompass a wide variety of entities the primary goal of which is to conduct scientific research or to do so together with the provision of educational services. The term ‘scientific research’ within the meaning of this Directive should be understood to cover both the natural sciences and the human sciences. Due to the diversity of such entities, it is important to have a common understanding of research organisations. They should for example cover, in addition to universities or other higher education institutions and their libraries, also entities such as research institutes and hospitals that carry out research. Despite different legal forms and structures, research organisations in the Member States generally have in common that they act either on a not-for-profit basis or in the context of a public-interest mission recognised by the State. Such a public-interest mission could, for example, be reflected through public funding or through provisions in national laws or public contracts. Conversely, organisations upon which commercial undertakings have a decisive influence allowing such undertakings to exercise control because of structural situations, such as through their quality of shareholder or member, which could result in preferential access to the results of the research, should not be considered research organisations for the purposes of this Directive.

(13) Cultural heritage institutions should be understood as covering publicly accessible libraries and museums regardless of the type of works or other subject matter that they hold in their permanent collections, as well as archives, film or audio heritage institutions. They should also be understood to include, inter alia, national libraries and national archives, and, as far as their archives and publicly accessible libraries are concerned, educational establishments, research organisations and public sector broadcasting organisations.
Research organisations and cultural heritage institutions, including the persons attached thereto, should be covered by the text and data mining exception with regard to content to which they have lawful access. Lawful access should be understood as covering access to content based on an open access policy or through contractual arrangements between rightholders and research organisations or cultural heritage institutions, such as subscriptions, or through other lawful means. For instance, in the case of subscriptions taken by research organisations or cultural heritage institutions, the persons attached thereto and covered by those subscriptions should be deemed to have lawful access. Lawful access should also cover access to content that is freely available online.

Research organisations and cultural heritage institutions could in certain cases, for example for subsequent verification of scientific research results, need to retain copies made under the exception for the purposes of carrying out text and data mining. In such cases, the copies should be stored in a secure environment. Member States should be free to decide, at national level and after discussions with relevant stakeholders, on further specific arrangements for retaining the copies, including the ability to appoint trusted bodies for the purpose of storing such copies. In order not to unduly restrict the application of the exception, such arrangements should be proportionate and limited to what is needed for retaining the copies in a safe manner and preventing unauthorised use. Uses for the purpose of scientific research, other than text and data mining, such as scientific peer review and joint research, should remain covered, where applicable, by the exception or limitation provided for in Article 3(3)(a) of Directive 2001/29/EC.

In view of a potentially high number of access requests to, and downloads of, their works or other subject matter, rightholders should be allowed to apply measures when there is a risk that the security and integrity of their systems or databases could be jeopardised. Such measures could, for example, be used to ensure that only persons having lawful access to their data can access them, including through IP address validation or user authentication. Those measures should remain proportionate to the risks involved, and should not exceed what is necessary to pursue the objective of ensuring the security and integrity of the system and should not undermine the effective application of the exception.

In view of the nature and scope of the exception, which is limited to entities carrying out scientific research, any potential harm created to rightholders through this exception would be minimal. Member States should, therefore, not provide for compensation for rightholders as regards uses under the text and data mining exceptions introduced by this Directive.

In addition to their significance in the context of scientific research, text and data mining techniques are widely used both by private and public entities to analyse large amounts of data in different areas of life and for various purposes, including for government services, complex business decisions and the development of new applications or technologies. Rightholders should remain able to license the uses of their works or other subject matter falling outside the scope of the mandatory exception provided for in this Directive for text and data mining for the purposes of scientific research and of the existing exceptions and limitations provided for in Directive 2001/29/EC. At the same time, consideration should be given to the fact that users of text and data mining could be faced with legal uncertainty as to whether reproductions and extractions made for the purposes of text and data mining can be carried out on lawfully accessed works or other subject matter, in particular when the reproductions or extractions made for the purposes of the technical process do not fulfill all the conditions of the existing exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC. In order to provide for more legal certainty in such cases and to encourage innovation also in the private sector, this Directive should provide, under certain conditions, for an exception or limitation for reproductions and extractions of works or other subject matter, for the purposes of text and data mining, and allow the copies made to be retained for as long as is necessary for those text and data mining purposes.

This exception or limitation should only apply where the work or other subject matter is accessed lawfully by the beneficiary, including when it has been made available to the public online, and insofar as the rightholders have not reserved in an appropriate manner the rights to make reproductions and extractions for text and data mining. In the case of content that has been made publicly available online, it should only be considered
appropriate to reserve those rights by the use of machine-readable means, including metadata and terms and conditions of a website or a service. Other uses should not be affected by the reservation of rights for the purposes of text and data mining. In other cases, it can be appropriate to reserve the rights by other means, such as contractual agreements or a unilateral declaration. Rightholders should be able to apply measures to ensure that their reservations in this regard are respected. This exception or limitation should leave intact the mandatory exception for text and data mining for scientific research purposes provided for in this Directive, as well as the existing exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

(19) Article 5(3)(a) of Directive 2001/29/EC allows Member States to introduce an exception or limitation to the rights of reproduction, communication to the public and making available to the public of works or other subject matter in such a way that members of the public may access them from a place and a time individually chosen by them, for the sole purpose of illustration for teaching. In addition, Articles 6(2)(b) and 9(b) of Directive 96/9/EC permit the use of a database and the extraction of a substantial part of its contents for the purpose of illustration for teaching. The scope of those exceptions or limitations as they apply to digital uses is unclear. In addition, there is a lack of clarity as to whether those exceptions or limitations would apply where teaching is provided online and at a distance. Moreover, the existing legal framework does not provide for a cross-border effect. This situation could hamper the development of digitally supported teaching activities and distance learning. Therefore, the introduction of a new mandatory exception or limitation is necessary to ensure that educational establishments benefit from full legal certainty when using works or other subject matter in digital teaching activities, including online and across borders.

(20) While distance learning and cross-border education programmes are mostly developed at higher education level, digital tools and resources are increasingly used at all education levels, in particular to improve and enrich the learning experience. The exception or limitation provided for in this Directive should, therefore, benefit all educational establishments recognised by a Member State, including those involved in primary, secondary, vocational and higher education. It should apply only to the extent that the uses are justified by the non-commercial purpose of the particular teaching activity. The organisational structure and the means of funding of an educational establishment should not be the decisive factors in determining whether the activity is non-commercial in nature.

(21) The exception or limitation provided for in this Directive for the sole purpose of illustration for teaching should be understood as covering digital uses of works or other subject matter to support, enrich or complement the teaching, including learning activities. The distribution of software allowed under that exception or limitation should be limited to digital transmission of software. In most cases, the concept of illustration would, therefore, imply the use only of parts or extracts of works, which should not substitute for the purchase of materials primarily intended for the educational market. When implementing the exception or limitation, Member States should remain free to specify, for the different types of works or other subject matter, in a balanced manner, the proportion of a work or other subject matter that can be used for the sole purpose of illustration for teaching. Uses allowed under the exception or limitation should be understood to cover the specific accessibility needs of persons with a disability in the context of illustration for teaching.

(22) The use of works or other subject matter under the exception or limitation for the sole purpose of illustration for teaching provided for in this Directive should only take place in the context of teaching and learning activities carried out under the responsibility of educational establishments, including during examinations or teaching activities that take place outside the premises of educational establishments, for example in a museum, library or another cultural heritage institution, and should be limited to what is necessary for the purpose of such activities. The exception or limitation should cover both uses of works or other subject matter made in the classroom or in other venues through digital means, for example electronic whiteboards or digital devices which might be connected to the internet, as well as uses made at a distance through secure electronic environments, such as in the context of online courses or access to teaching material complementing a given course. Secure electronic environments should be understood as digital teaching and learning environments access to which is limited to an educational establishment’s teaching staff and to pupils or students enrolled in a study programme, in particular through appropriate authentication procedures including password-based authentication.
(23) Different arrangements, based on the implementation of the exception or limitation provided for in Directive 2001/29/EC or on licensing agreements covering further uses, are in place in a number of Member States in order to facilitate educational uses of works and other subject matter. Such arrangements have usually been developed taking account of the needs of educational establishments and of different levels of education. While it is essential to harmonise the scope of the new mandatory exception or limitation in relation to digital uses and cross-border teaching activities, the arrangements for implementation can vary from one Member State to another, to the extent that they do not hamper the effective application of the exception or limitation or cross-border uses. Member States should, for example, remain free to require that the use of works or other subject matter respect the moral rights of authors and performers. This should allow Member States to build on the existing arrangements concluded at national level. In particular, Member States could decide to subject the application of the exception or limitation, fully or partially, to the availability of suitable licences, covering at least the same uses as those allowed under the exception or limitation. Member States should ensure that where licences cover only partially the uses allowed under the exception or limitation, all the other uses remain subject to the exception or limitation.

Member States could, for example, use this mechanism to give precedence to licences for material that is primarily intended for the educational market or licences for sheet music. In order to avoid that subjecting the application of the exception to the availability of licences results in legal uncertainty or an administrative burden for educational establishments, Member States adopting such an approach should take concrete measures to ensure that licensing schemes allowing digital uses of works or other subject matter for the purpose of illustration for teaching are easily available, and that educational establishments are aware of the existence of such licensing schemes. Such licensing schemes should meet the needs of educational establishments. Information tools aimed at ensuring that existing licensing schemes are visible could also be developed. Such schemes could, for example, be based on collective licensing or on extended collective licensing, in order to avoid educational establishments having to negotiate individually with rightholders. In order to guarantee legal certainty, Member States should specify under which conditions an educational establishment can use protected works or other subject matter under that exception and, conversely, when it should act under a licensing scheme.

(24) Member States should remain free to provide that rightholders receive fair compensation for the digital uses of their works or other subject matter under the exception or limitation provided for in this Directive for illustration for teaching. In setting the level of fair compensation, due account should be taken, inter alia, of Member States’ educational objectives and of the harm to rightholders. Member States that decide to provide for fair compensation should encourage the use of systems that do not create an administrative burden for educational establishments.

(25) Cultural heritage institutions are engaged in the preservation of their collections for future generations. An act of preservation of a work or other subject matter in the collection of a cultural heritage institution might require a reproduction and consequently require the authorisation of the relevant rightholders. Digital technologies offer new ways of preserving the heritage contained in those collections but they also create new challenges. In view of those new challenges, it is necessary to adapt the existing legal framework by providing for a mandatory exception to the right of reproduction in order to allow such acts of preservation by such institutions.

(26) The existence of different approaches in the Member States with regard to acts of reproduction for preservation by cultural heritage institutions hampers cross-border cooperation, the sharing of means of preservation and the establishment of cross-border preservation networks in the internal market by such institutions, leading to an inefficient use of resources. That can have a negative impact on the preservation of cultural heritage.

(27) Member States should, therefore, be required to provide for an exception to permit cultural heritage institutions to reproduce works and other subject matter permanently in their collections for preservation purposes, for example to address technological obsolescence or the degradation of original supports or to insure such works and other subject matter. Such an exception should allow the making of copies by the appropriate preservation tool, means or technology, in any format or medium, in the required number, at any point in the life of a work or other subject matter and to the extent required for preservation purposes. Acts of reproduction undertaken by
cultural heritage institutions for purposes other than the preservation of works and other subject matter in their permanent collections should remain subject to the authorisation of rightholders, unless permitted by other exceptions or limitations provided for in Union law.

(28) Cultural heritage institutions do not necessarily have the technical means or expertise to undertake the acts required to preserve their collections themselves, particularly in the digital environment, and might, therefore, have recourse to the assistance of other cultural institutions and other third parties for that purpose. Under the exception for preservation purposes provided for by this Directive, cultural heritage institutions should be allowed to rely on third parties acting on their behalf and under their responsibility, including those that are based in other Member States, for the making of copies.

(29) For the purposes of this Directive, works and other subject matter should be considered to be permanently in the collection of a cultural heritage institution when copies of such works or other subject matter are owned or permanently held by that institution, for example as a result of a transfer of ownership or a licence agreement, legal deposit obligations or permanent custody arrangements.

(30) Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of works or other subject matter that are considered to be out of commerce for the purposes of this Directive. However, the particular characteristics of the collections of out-of-commerce works or other subject matter, together with the amount of works and other subject matter involved in mass digitisation projects, mean that obtaining the prior authorisation of the individual rightholders can be very difficult. This can be due, for example, to the age of the works or other subject matter, their limited commercial value or the fact that they were never intended for commercial use or that they have never been exploited commercially. It is therefore necessary to provide for measures to facilitate certain uses of out-of-commerce works or other subject matter that are permanently in the collections of cultural heritage institutions.

(31) All Member States should have legal mechanisms in place allowing licences issued by relevant and sufficiently representative collective management organisations to cultural heritage institutions, for certain uses of out-of-commerce works or other subject matter, to also apply to the rights of rightholders that have not mandated a representative collective management organisation in that regard. It should be possible, pursuant to this Directive, for such licences to cover all Member States.

(32) The provisions on collective licensing of out-of-commerce works or other subject matter introduced by this Directive might not provide a solution for all cases in which cultural heritage institutions encounter difficulties in obtaining the necessary authorisations from rightholders for the use of such out-of-commerce works or other subject matter. That could be the case for example, where there is no practice of collective management of rights for a certain type of work or other subject matter or where the relevant collective management organisation is not sufficiently representative for the category of the rightholders and of the rights concerned. In such particular instances, it should be possible for cultural heritage institutions to make out-of-commerce works or other subject matter that are permanently in their collection available online in all Member States under a harmonised exception or limitation to copyright and related rights. It is important that uses under such exception or limitation only take place when certain conditions, in particular as regards the availability of licensing solutions, are fulfilled. A lack of agreement on the conditions of the licence should not be interpreted as a lack of availability of licensing solutions.

(33) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of licensing mechanism, such as extended collective licensing or presumptions of representation, that they put in place for the use of out-of-commerce works or other subject matter by cultural heritage institutions, in accordance with their legal traditions, practices or circumstances. Member States should also have flexibility in determining what the requirements for collective management organisations to be sufficiently representative are, as long as that determination is based on a significant number of rightholders in the relevant type of works or other subject matter having given a mandate allowing the licensing of the relevant type of use.
Member States should be free to establish specific rules applicable to cases in which more than one collective management organisation is representative for the relevant works or other subject matter, requiring for example joint licences or an agreement between the relevant organisations.

(34) For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is important. Directive 2014/26/EU provides for such a system and that system includes in particular rules on good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual rightholders.

(35) Appropriate safeguards should be available for all rightholders, who should be given the opportunity of excluding the application of the licensing mechanisms and of the exception or limitation, introduced by this Directive for the use of out-of-commerce works or other subject matter, in relation to all their works or other subject matter, in relation to all licences or all uses under the exception or limitation, in relation to particular works or other subject matter, or in relation to particular licences or uses under the exception or limitation, at any time before or during the term of the licence or before or during the use under the exception or limitation. Conditions governing those licensing mechanisms should not affect their practical relevance for cultural heritage institutions. It is important that, where a rightholder excludes the application of such mechanisms or of such exception or limitation to one or more works or other subject matter, any ongoing uses are terminated within a reasonable period, and, where they take place under a collective licence, that the collective management organisation once informed ceases to issue licences covering the uses concerned. Such exclusion by rightholders should not affect their claims to remuneration for the actual use of the work or other subject matter under the licence.

(36) This Directive does not affect the ability of Member States to decide who is to have legal responsibility as regards the compliance of the licensing of out-of-commerce works or other subject matter, and of their use, with the conditions set out in this Directive, and as regards the compliance of the parties concerned with the terms of those licences.

(37) Considering the variety of works and other subject matter in the collections of cultural heritage institutions, it is important that the licensing mechanisms and the exception or limitation provided for by this Directive are available and can be used in practice for different types of works and other subject matter, including photographs, software, phonograms, audiovisual works and unique works of art, including where they have never been commercially available. Never-in-commerce works can include posters, leaflets, trench journals or amateur audiovisual works, but also unpublished works or other subject matter, without prejudice to other applicable legal constraints, such as national rules on moral rights. When a work or other subject matter is available in any of its different versions, such as subsequent editions of literary works and alternate cuts of cinematographic works, or in any of its different manifestations, such as digital and printed formats of the same work, that work or other subject matter should not be considered out of commerce. Conversely, the commercial availability of adaptations, including other language versions or audiovisual adaptations of a literary work, should not preclude a work or other subject matter from being deemed to be out of commerce in a given language. In order to reflect the specificities of different types of works and other subject matter as regards modes of publication and distribution, and to facilitate the usability of those mechanisms, specific requirements and procedures might have to be established for the practical application of those licensing mechanisms, such as a requirement for a certain time period to have elapsed since the work or other subject matter was first commercially available. It is appropriate that Member States consult rightholders, cultural heritage institutions and collective management organisations when establishing such requirements and procedures.

(38) When determining whether works or other subject matter are out of commerce, a reasonable effort should be required to assess their availability to the public in the customary channels of commerce, taking into account the characteristics of the particular work or other subject matter or of the particular set of works or other subject matter. Member States should be free to determine the allocation of responsibilities for making that reasonable effort. The reasonable effort should not have to involve repeated action over time but it should nevertheless involve taking account of any easily accessible evidence of upcoming availability of works or other subject matter in the customary channels of commerce. A work-by-work assessment should only be required where that is considered reasonable in view of the availability of relevant information, the likelihood of commercial availability
and the expected transaction cost. Verification of availability of a work or other subject matter should normally take place in the Member State where the cultural heritage institution is established, unless verification across borders is considered reasonable, for example in cases where there is easily available information that a literary work was first published in a given language version in another Member State. In many cases, the out-of-commerce status of a set of works or other subject matter could be determined through a proportionate mechanism, such as sampling. The limited availability of a work or other subject matter, such as its availability in second-hand shops, or the theoretical possibility that a licence for a work or other subject matter could be obtained should not be considered as availability to the public in the customary channels of commerce.

(39) For reasons of international comity, the licensing mechanism and the exception or limitation provided for in this Directive for the digitisation and dissemination of out-of-commerce works or other subject matter should not apply to sets of out-of-commerce works or other subject matter where there is evidence available to presume that they predominantly consist of works or other subject matter of third countries, unless the collective management organisation concerned is sufficiently representative for that third country, for example via a representation agreement. That assessment could be based on the evidence available following the making of the reasonable effort to determine whether the works or other subject matter are out of commerce, without the need to search for further evidence. A work-by-work assessment of the origin of out-of-commerce works or other subject matter should only be required insofar as it is also required for making the reasonable effort to determine whether they are commercially available.

(40) Contracting cultural heritage institutions and collective management organisations should remain free to agree on the territorial scope of licences, including the option of covering all Member States, the licence fee and the uses allowed. Uses covered by such licences should not be for profit-making purposes, including where copies are distributed by the cultural heritage institution, such as in the case of promotional material about an exhibition. At the same time, given that the digitisation of the collections of cultural heritage institutions can entail significant investments, any licences granted under the mechanism provided for in this Directive should not prevent cultural heritage institutions from covering the costs of the licence and the costs of digitising and disseminating the works or other subject matter covered by the licence.

(41) Information regarding the ongoing and future use of out-of-commerce works and other subject matter by cultural heritage institutions on the basis of this Directive and the arrangements in place for all rightholders to exclude the application of licences or of the exception or limitation to their works or other subject matter should be adequately publicised both before and during the use under a licence or under the exception or limitation, as appropriate. Such publicising is particularly important when uses take place across borders in the internal market. It is therefore appropriate to provide for the creation of a single publicly accessible online portal for the Union in order to make such information available to the public for a reasonable period of time before the use takes place. Such portal should make it easier for rightholders to exclude the application of licences or of the exception or limitation to their works or other subject matter. Under Regulation (EU) No 386/2012 of the European Parliament and of the Council (11), the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary means and aimed at facilitating and supporting the activities of national authorities, the private sector and Union institutions in the fight against, including the prevention of, infringement of intellectual property rights. It is therefore appropriate to rely on that Office to establish and manage the portal making such information available.

In addition to making the information available through the portal, further appropriate publicity measures might need to be taken on a case-by-case basis in order to increase the awareness in that regard of the rightholders concerned, for example through the use of additional channels of communication to reach a wider public. The necessity, the nature and the geographic scope of the additional publicity measures should depend on the characteristics of the relevant out-of-commerce works or other subject matter, the terms of the licences or the type of use under the exception or limitation, and the existing practices in Member States. Publicity measures should be effective without the need to inform each rightholder individually.

(42) In order to ensure that the licensing mechanisms established by this Directive for out-of-commerce works or other subject matter are relevant and function properly, that rightholders are adequately protected, that licences are properly publicised and that legal certainty is provided with regard to the representativeness of collective management organisations and the categorisation of works, Member States should foster sector-specific stakeholder dialogue.

(43) The measures provided for in this Directive to facilitate the collective licensing of rights in out-of-commerce works or other subject matter that are permanently in the collections of cultural heritage institutions should be without prejudice to the use of such works or other subject matter under exceptions or limitations provided for in Union law, or under other licences with an extended effect, where such licensing is not based on the out-of-commerce status of the covered works or other subject matter. Those measures should also be without prejudice to national mechanisms for the use of out-of-commerce works or other subject matter based on licences between collective management organisations and users other than cultural heritage institutions.

(44) Mechanisms of collective licensing with an extended effect allow a collective management organisation to offer licences as a collective licensing body on behalf of rightholders, irrespective of whether they have authorised the organisation to do so. Systems built on mechanisms such as extended collective licensing, legal mandates or presumptions of representation, are a well-established practice in several Member States and can be used in different areas. A functioning copyright framework that works for all parties requires the availability of proportionate, legal mechanisms for the licensing of works or other subject matter. Member States should, therefore, be able to rely on solutions allowing collective management organisations to offer licences covering a potentially large number of works or other subject matter for certain types of use, and to distribute the revenue resulting from such licences to rightholders, in accordance with Directive 2014/26/EU.

(45) Given the nature of some uses, together with the usually large amount of works or other subject matter involved, the transaction cost of individual rights clearance with every rightholder concerned is prohibitively high. As a result, it is unlikely that, without effective collective licensing mechanisms, all the transactions in the areas concerned that are required to enable the use of such works or other subject matter would take place. Extended collective licensing by collective management organisations and similar mechanisms can make it possible to conclude agreements in those areas where collective licensing based on an authorisation by rightholders does not provide an exhaustive solution for covering all works or other subject matter to be used. Such mechanisms complement collective management of rights based on individual authorisation by rightholders, by providing full legal certainty to users in certain cases. At the same time, they provide an opportunity to rightholders to benefit from the legitimate use of their works.

(46) Given the increasing importance of the ability to offer flexible licensing schemes in the digital age, and the increasing use of such schemes, Member States should be able to provide for licensing mechanisms which permit collective management organisations to conclude licences, on a voluntary basis, irrespective of whether all rightholders have authorised the organisation concerned to do so. Member States should have the ability to maintain and introduce such mechanisms in accordance with their national traditions, practices or circumstances, subject to the safeguards provided for in this Directive and in compliance with Union law and the international obligations of the Union. Such mechanisms should only have effect in the territory of the Member State concerned, unless otherwise provided for in Union law. Member States should have flexibility in choosing the specific type of mechanism allowing licences for works or other subject matter to extend to the rights of rightholders that have not authorised the organisation that concludes the agreement, provided that such mechanism is in compliance with Union law, including with the rules on collective management of rights provided for in Directive 2014/26/EU. In particular, such mechanisms should also ensure that Article 7 of Directive 2014/26/EU applies to rightholders that are not members of the organisation that concludes the agreement. Such mechanisms could include extended collective licensing, legal mandates and presumptions of representation. The provisions of this Directive concerning collective licensing should not affect the existing ability of Member States to apply mandatory collective management of rights or other collective licensing mechanisms with an extended effect, such as that included in Article 3 of Council Directive 93/83/EEC (25).

It is important that mechanisms of collective licensing with an extended effect are only applied in well-defined areas of use, in which obtaining authorisation from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction, namely one involving a licence that covers all rightholders concerned, unlikely to occur due to the nature of the use or of the types of works or other subject matter concerned. Such mechanisms should be based on objective, transparent and non-discriminatory criteria as regards the treatment of rightholders, including rightholders who are not members of the collective management organisation. In particular, the mere fact that the rightholders affected are not nationals or residents of, or established in, the Member State of the user who is seeking a licence, should not be in itself a reason to consider the clearance of rights to be so onerous and impractical as to justify the use of such mechanisms. It is equally important that the licensed use neither affect adversely the economic value of the relevant rights nor deprive rightholders of significant commercial benefits.

Member States should ensure that appropriate safeguards are in place to protect the legitimate interests of rightholders that have not mandated the organisation offering the licence and that those safeguards apply in a non-discriminatory manner. Specifically, in order to justify the extended effect of the mechanisms, such an organisation should be, on the basis of authorisations from rightholders, sufficiently representative of the types of works or other subject matter and of the rights which are the subject of the licence. Member States should determine the requirements to be satisfied for those organisations to be considered sufficiently representative, taking into account the category of rights managed by the organisation, the ability of the organisation to manage the rights effectively, the creative sector in which it operates, and whether the organisation covers a significant number of rightholders in the relevant type of works or other subject matter who have given a mandate allowing the licensing of the relevant type of use, in accordance with Directive 2014/26/EU. To provide legal certainty and ensure that there is confidence in the mechanisms, Member States should be allowed to decide who is to have legal responsibility as regards uses authorised by the licence agreement. Equal treatment should be guaranteed to all rightholders whose works are exploited under the licence, including in particular as regards access to information on the licensing and the distribution of remuneration. Publicity measures should be effective throughout the duration of the licence and should not involve imposing a disproportionate administrative burden on users, collective management organisations or rightholders, and without the need to inform each rightholder individually.

In order to ensure that rightholders can easily regain control of their works, and prevent any uses of their works that would be prejudicial to their interests, it is essential that rightholders be given an effective opportunity to exclude the application of such mechanisms to their works or other subject matter for all uses and works or other subject matter, or for specific uses and works or other subject matter, including before the conclusion of a licence and during the term of the licence. In such cases, any ongoing use should be terminated within a reasonable period. Such exclusion by rightholders should not affect their claims for remuneration for the actual use of the work or other subject matter under the licence. Member States should also be able to decide that additional measures are appropriate to protect rightholders. Such additional measures could include, for example, encouraging the exchange of information among collective management organisations and other interested parties across the Union to raise awareness about such mechanisms and the option available to rightholders to exclude their works or other subject matter from those mechanisms.

Member States should ensure that the purpose and scope of any licence granted as a result of mechanisms of collective licensing with an extended effect, as well as the possible uses, should always be carefully and clearly defined in law or, if the underlying law is a general provision, in the licensing practices applied as a result of such general provisions, or in the licences granted. The ability to operate a licence under such mechanisms should also be limited to collective management organisations that are subject to national law implementing Directive 2014/26/EU.

Given the different traditions and experiences in relation to mechanisms of collective licensing with an extended effect across Member States, and their applicability to rightholders irrespective of their nationality or their Member State of residence, it is important to ensure that there is transparency and dialogue at Union level about the practical functioning of such mechanisms, including as regards the effectiveness of safeguards for rightholders, the usability of such mechanisms, their effect on rightholders who are not members of the collective management organisation, or on rightholders who are nationals of, or resident in, another Member State, and the
impact on the cross-border provision of services, including the potential need to lay down rules to give such mechanisms cross-border effect within the internal market. To ensure transparency, information about the use of such mechanisms under this Directive should be regularly published by the Commission. Member States that have introduced such mechanisms should, therefore, inform the Commission about relevant national provisions and their application in practice, including the scope and types of licensing introduced on the basis of general provisions, the scale of licensing and the collective management organisations involved. Such information should be discussed with Member States in the contact committee established in Article 12(3) of Directive 2001/29/EC. The Commission should publish a report on the use of such mechanisms in the Union and their impact on licensing and rightholders, on the dissemination of cultural content and on the cross-border provision of services in the area of collective management of copyright and related rights, as well as on the impact on competition.

Video-on-demand services have the potential to play a decisive role in the dissemination of audiovisual works across the Union. However, the availability of such works, in particular European works, on video-on-demand services remains limited. Agreements on the online exploitation of such works can be difficult to conclude due to issues related to the licensing of rights. Such issues could, for instance, arise when the holder of the rights for a given territory has a low economic incentive to exploit a work online and does not license or holds back the online rights, which can lead to audiovisual works being unavailable on video-on-demand services. Other issues could relate to windows of exploitation.

To facilitate the licensing of rights in audiovisual works to video-on-demand services, Member States should be required to provide for a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body or of one or more mediators. For that purpose, Member States should be allowed either to establish a new body or rely on an existing one that fulfils the conditions established by this Directive. Member States should be able to designate one or more competent bodies or mediators. The body or the mediators should meet with the parties and help with the negotiations by providing professional, impartial and external advice. Where a negotiation involves parties from different Member States and where those parties decide to rely on the negotiation mechanism, the parties should agree beforehand on the competent Member State. The body or the mediators could meet with the parties to facilitate the start of negotiations or in the course of the negotiations to facilitate the conclusion of an agreement. Participation in that negotiation mechanism and the subsequent conclusion of agreements should be voluntary and should not affect the parties' contractual freedom. Member States should be free to decide on the specific functioning of the negotiation mechanism, including the timing and duration of the assistance to negotiations and the bearing of the costs. Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation mechanism. Without it being an obligation for them, Member States should encourage dialogue between representative organisations.

The expiry of the term of protection of a work entails the entry of that work into the public domain and the expiry of the rights that Union copyright law provides in relation to that work. In the field of visual arts, the circulation of faithful reproductions of works in the public domain contributes to the access to and promotion of culture, and the access to cultural heritage. In the digital environment, the protection of such reproductions through copyright or related rights is inconsistent with the expiry of the copyright protection of works. In addition, differences between the national copyright laws governing the protection of such reproductions give rise to legal uncertainty and affect the cross-border dissemination of works of visual arts in the public domain. Certain reproductions of works of visual arts in the public domain should, therefore, not be protected by copyright or related rights. All of that should not prevent cultural heritage institutions from selling reproductions, such as postcards.

A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. The wide availability of press publications online has given rise to the emergence of new online services, such as news aggregators or media monitoring services, for which the reuse of press publications constitutes an important part of their business models and a source of revenue. Publishers of press publications are facing problems in
licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments. In the absence of recognition of publishers of press publications as rightholders, the licensing and enforcement of rights in press publications regarding online uses by information society service providers in the digital environment are often complex and inefficient.

(55) The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information. It is therefore necessary to provide at Union level for harmonised legal protection for press publications in respect of online uses by information society service providers, which leaves the existing copyright rules in Union law applicable to private or non-commercial uses of press publications by individual users unaffected, including where such users share press publications online. Such protection should be effectively guaranteed through the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of press publications of publishers established in a Member State in respect of online uses by information society service providers within the meaning of Directive (EU) 2015/1535 of the European Parliament and of the Council (13). The legal protection for press publications provided for by this Directive should benefit publishers that are established in a Member State and have their registered office, central administration or principal place of business within the Union.

The concept of publisher of press publications should be understood as covering service providers, such as news publishers or news agencies, when they publish press publications within the meaning of this Directive.

(56) For the purposes of this Directive, it is necessary to define the concept of ‘press publication’ so that it only covers journalistic publications, published in any media, including on paper, in the context of an economic activity that constitutes a provision of services under Union law. The press publications that should be covered include, for instance, daily newspapers, weekly or monthly magazines of general or special interest, including subscription-based magazines, and news websites. Press publications contain mostly literary works, but increasingly include other types of works and other subject matter, in particular photographs and videos. Periodical publications published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive. Neither should that protection apply to websites, such as blogs, that provide information as part of an activity that is not carried out under the initiative, editorial responsibility and control of a service provider, such as a news publisher.

(57) The rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC, insofar as online uses by information society service providers are concerned. The rights granted to publishers of press publications should not extend to acts of hyperlinking. They should also not extend to mere facts reported in press publications. The rights granted to publishers of press publications under this Directive should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC, including the exception in the case of quotations for purposes such as criticism or review provided for in Article 5(3)(d) of that Directive.

(58) The use of press publications by information society service providers can consist of the use of entire publications or articles but also of parts of press publications. Such uses of parts of press publications have also gained economic relevance. At the same time, the use of individual words or very short extracts of press publications by information society service providers may not undermine the investments made by publishers of press publications in the production of content. Therefore, it is appropriate to provide that the use of individual words or very short extracts of press publications should not fall within the scope of the rights provided for in this Directive. Taking into account the massive aggregation and use of press publications by information society service providers, it is important that the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive.

The protection granted to publishers of press publications under this Directive should not affect the rights of the authors and other rightholders in the works and other subject matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject matter independently from the press publication in which they are incorporated. Publishers of press publications should, therefore, not be able to invoke the protection granted to them under this Directive against authors and other rightholders or against other authorised users of the same works or other subject matter. That should be without prejudice to contractual arrangements concluded between the publishers of press publications, on the one hand, and authors and other rightholders, on the other. Authors whose works are incorporated in a press publication should be entitled to an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers. That should be without prejudice to contractual arrangements concluded between the publishers of press publications, on the one hand, and authors and other rightholders, on the other. Authors whose works are incorporated in a press publication should be entitled to an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers. That should be without prejudice to national laws on ownership or exercise of rights in the context of employment contracts, provided that such laws are in compliance with Union law.

Publishers, including those of press publications, books or scientific publications and music publications, often operate on the basis of the transfer of authors' rights by means of contractual agreements or statutory provisions. In that context, publishers make an investment with a view to the exploitation of the works contained in their publications and can in some instances be deprived of revenues where such works are used under exceptions or limitations such as those for private copying and reprography, including the corresponding existing national schemes for reprography in the Member States, or under public lending schemes. In several Member States, compensation for uses under those exceptions or limitations is shared between authors and publishers. In order to take account of this situation and to improve legal certainty for all parties concerned, this Directive allows Member States that have existing schemes for the sharing of compensation between authors and publishers to maintain them. That is particularly important for Member States that had such compensation-sharing mechanisms before 12 November 2015, although in other Member States compensation is not shared and is due solely to authors in accordance with national cultural policies. While this Directive should apply in a non-discriminatory way to all Member States, it should respect the traditions in this area and not oblige Member States that do not currently have such compensation-sharing schemes to introduce them. It should not affect existing or future arrangements in Member States regarding remuneration in the context of public lending.

It should also leave national arrangements relating to the management of rights and to remuneration rights unaffected, provided that they are in compliance with Union law. All Member States should be allowed but not obliged to provide that, where authors have transferred or licensed their rights to a publisher or otherwise contribute with their works to a publication, and there are systems in place to compensate for the harm caused to them by an exception or limitation, including through collective management organisations that jointly represent authors and publishers, publishers are entitled to a share of such compensation. Member States should remain free to determine how publishers are to substantiate their claims for compensation or remuneration, and to lay down the conditions for the sharing of such compensation or remuneration between authors and publishers in accordance with their national systems.

In recent years, the functioning of the online content market has gained in complexity. Online content-sharing services providing access to a large amount of copyright-protected content uploaded by their users have become a main source of access to content online. Online services are a means of providing wider access to cultural and creative works and offer great opportunities for cultural and creative industries to develop new business models. However, although they enable diversity and ease of access to content, they also generate challenges when copyright-protected content is uploaded without prior authorisation from rightholders. Legal uncertainty exists as to whether the providers of such services engage in copyright-relevant acts, and need to obtain authorisation from rightholders for content uploaded by their users who do not hold the relevant rights in the uploaded content, without prejudice to the application of exceptions and limitations provided for in Union law. That uncertainty affects the ability of rightholders to determine whether, and under which conditions, their works and other subject matter are used, as well as their ability to obtain appropriate remuneration for such use. It is therefore important to foster the development of the licensing market between rightholders and online content-sharing service providers. Those licensing agreements should be fair and keep a reasonable balance
between both parties. Rightholders should receive appropriate remuneration for the use of their works or other subject matter. However, as contractual freedom should not be affected by those provisions, rightholders should not be obliged to give an authorisation or to conclude licensing agreements.

(62) Certain information society services, as part of their normal use, are designed to give access to the public to copyright-protected content or other subject matter uploaded by their users. The definition of an online content-sharing service provider laid down in this Directive should target only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences. The services covered by this Directive are services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it. Such services should not include services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity. The latter services include, for instance, electronic communication services within the meaning of Directive (EU) 2018/1972 of the European Parliament and of the Council (14), as well as providers of business-to-business cloud services and cloud services, which allow users to upload content for their own use, such as cyberlockers, or online marketplaces the main activity of which is online retail, and not giving access to copyright-protected content.

Providers of services such as open source software development and sharing platforms, not-for-profit scientific or educational repositories as well as not-for-profit online encyclopedias should also be excluded from the definition of online content-sharing service provider. Finally, in order to ensure a high level of copyright protection, the liability exemption mechanism provided for in this Directive should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy.

(63) The assessment of whether an online content-sharing service provider stores and gives access to a large amount of copyright-protected content should be made on a case-by-case basis and should take account of a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the service.

(64) It is appropriate to clarify in this Directive that online content-sharing service providers perform an act of communication to the public or of making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users. Consequently, online content-sharing service providers should obtain an authorisation, including via a licensing agreement, from the relevant rightholders. This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content.

(65) When online content-sharing service providers are liable for acts of communication to the public or making available to the public under the conditions laid down in this Directive, Article 14(1) of Directive 2000/31/EC should not apply to the liability arising from the provision of this Directive on the use of protected content by online content-sharing service providers. That should not affect the application of Article 14(1) of Directive 2000/31/EC to such service providers for purposes falling outside the scope of this Directive.

(66) Taking into account the fact that online content-sharing service providers give access to content which is not uploaded by them but by their users, it is appropriate to provide for a specific liability mechanism for the purposes of this Directive for cases in which no authorisation has been granted. That should be without prejudice

to remedies under national law for cases other than liability for copyright infringements and to national courts or administrative authorities being able to issue injunctions in compliance with Union law. In particular, the specific regime applicable to new online content-sharing service providers with an annual turnover below EUR 10 million, of which the average number of monthly unique visitors in the Union does not exceed 5 million, should not affect the availability of remedies under Union and national law. Where no authorisation has been granted to service providers, they should make their best efforts in accordance with high industry standards of professional diligence to avoid the availability on their services of unauthorised works and other subject matter, as identified by the relevant rightholders. For that purpose, rightholders should provide the service providers with relevant and necessary information taking into account, among other factors, the size of rightholders and the type of their works and other subject matter. The steps taken by online content-sharing service providers in cooperation with rightholders should not lead to the prevention of the availability of non-infringing content, including works or other protected subject matter the use of which is covered by a licensing agreement, or an exception or limitation to copyright and related rights. Steps taken by such service providers should, therefore, not affect users who are using the online content-sharing services in order to lawfully upload and access information on such services.

In addition, the obligations established in this Directive should not lead to Member States imposing a general monitoring obligation. When assessing whether an online content-sharing service provider has made its best efforts in accordance with the high industry standards of professional diligence, account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website, taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments, as well as the principle of proportionality. For the purposes of that assessment, a number of elements should be considered, such as the size of the service, the evolving state of the art as regards existing means, including potential future developments, to avoid the availability of different types of content and the cost of such means for the services. Different means to avoid the availability of unauthorised copyright-protected content could be appropriate and proportionate depending on the type of content, and, therefore, it cannot be excluded that in some cases availability of unauthorised content can only be avoided upon notification of rightholders. Any steps taken by service providers should be effective with regard to the objectives pursued but should not go beyond what is necessary to achieve the objective of avoiding and discontinuing the availability of unauthorised works and other subject matter.

If unauthorised works and other subject matter become available despite the best efforts made in cooperation with rightholders, as required by this Directive, the online content-sharing service providers should be liable in relation to the specific works and other subject matter for which they have received the relevant and necessary information from rightholders, unless those providers demonstrate that they have made their best efforts in accordance with high industry standards of professional diligence.

In addition, where specific unauthorised works or other subject matter have become available on online content-sharing services, including irrespective of whether the best efforts were made and regardless of whether rightholders have made available the relevant and necessary information in advance, the online content-sharing service providers should be liable for unauthorised acts of communication to the public of works or other subject matter, when, upon receiving a sufficiently substantiated notice, they fail to act expeditiously to disable access to, or to remove from their websites, the notified works or other subject matter. Additionally, such online content-sharing service providers should also be liable if they fail to demonstrate that they have made their best efforts to prevent the future uploading of specific unauthorised works, based on relevant and necessary information provided by rightholders for that purpose.

Where rightholders do not provide online content-sharing service providers with the relevant and necessary information on their specific works or other subject matter, or where no notification concerning the disabling of access to, or the removal of, specific unauthorised works or other subject matter has been provided by rightholders, and, as a result, those service providers cannot make their best efforts to avoid the availability of
unauthorised content on their services, in accordance with high industry standards of professional diligence, such service providers should not be liable for unauthorised acts of communication to the public or of making available to the public of such unidentified works or other subject matter.

(67) Similar to Article 16(2) of Directive 2014/26/EU, this Directive provides for rules as regards new online services. The rules provided for in this Directive are intended to take into account the specific case of start-up companies working with user uploads to develop new business models. The specific regime applicable to new service providers with a small turnover and audience should benefit genuinely new businesses, and should therefore cease to apply three years after their services first became available online in the Union. That regime should not be abused by arrangements aimed at extending its benefits beyond the first three years. In particular, it should not apply to newly created services or to services provided under a new name but which pursue the activity of an already existing online content-sharing service provider which could not benefit or no longer benefits from that regime.

(68) Online content-sharing service providers should be transparent with rightholders with regard to the steps taken in the context of cooperation. As various actions could be undertaken by online content-sharing service providers, they should provide rightholders, at the request of rightholders, with adequate information on the type of actions undertaken and the way in which they are undertaken. Such information should be sufficiently specific to provide enough transparency to rightholders, without affecting business secrets of online content-sharing service providers. Service providers should, however, not be required to provide rightholders with detailed and individualised information for each work or other subject matter identified. That should be without prejudice to contractual arrangements, which could contain more specific provisions on the information to be provided where agreements are concluded between service providers and rightholders.

(69) Where online content-sharing service providers obtain authorisations, including through licensing agreements, for the use on their service of content uploaded by the users of the service, those authorisations should also cover the copyright relevant acts in respect of uploads by users within the scope of the authorisation granted to the service providers, but only in cases where those users act for non-commercial purposes, such as sharing their content without any profit-making purpose, or where the revenue generated by their uploads is not significant in relation to the copyright relevant acts of the users covered by such authorisations. Where rightholders have explicitly authorised users to upload and make available works or other subject matter on an online content-sharing service, the act of communication to the public of the service provider is authorised within the scope of the authorisation granted by the rightholder. However, there should be no presumption in favour of online content-sharing service providers that their users have cleared all relevant rights.

(70) The steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union (the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content-sharing service providers operate an effective complaint and redress mechanism to support use for such specific purposes.

Online content-sharing service providers should also put in place effective and expeditious complaint and redress mechanisms allowing users to complain about the steps taken with regard to their uploads, in particular where they could benefit from an exception or limitation to copyright in relation to an upload to which access has been disabled or that has been removed. Any complaint filed under such mechanisms should be processed without
undue delay and be subject to human review. When rightholders request the service providers to take action against uploads by users, such as disabling access to or removing content uploaded, such rightholders should duly justify their requests. Moreover, cooperation should not lead to any identification of individual users nor to the processing of personal data, except in accordance with Directive 2002/58/EC of the European Parliament and of the Council \(^{(15)}\) and Regulation (EU) 2016/679 of the European Parliament and of the Council \(^{(16)}\). Member States should also ensure that users have access to out-of-court redress mechanisms for the settlement of disputes. Such mechanisms should allow disputes to be settled impartially. Users should also have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights.

(71) As soon as possible after the date of entry into force of this Directive, the Commission, in cooperation with Member States, should organise dialogues between stakeholders to ensure uniform application of the obligation of cooperation between online content-sharing service providers and rightholders and to establish best practices with regard to the appropriate industry standards of professional diligence. For that purpose, the Commission should consult relevant stakeholders, including users’ organisations and technology providers, and take into account developments on the market. Users’ organisations should also have access to information on actions carried out by online content-sharing service providers to manage content online.

(72) Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law. That need for protection does not arise where the contractual counterpart acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts.

(73) The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author’s or performer’s contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work. A lump sum payment can also constitute proportionate remuneration but it should not be the rule. Member States should have the freedom to define specific cases for the application of lump sums, taking into account the specificities of each sector. Member States should be free to implement the principle of appropriate and proportionate remuneration through different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law.

(74) Authors and performers need information to assess the economic value of rights of theirs that are harmonised under Union law. This is especially the case where natural persons grant a licence or a transfer of rights for the purposes of exploitation in return for remuneration. That need does not arise where the exploitation has ceased, or where the author or performer has granted a licence to the general public without remuneration.

(75) As authors and performers tend to be in the weaker contractual position when they grant licences or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency. Therefore, the sharing of adequate and accurate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system governing the remuneration of authors and


Certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few opportunities for authors and performers to renegotiate them with their contractual counterparts or their successors in title in the event that the economic value of the rights turns out to be significantly higher than initially estimated. Accordingly, without prejudice to the law applicable to contracts in Member States, a remuneration adjustment mechanism should be provided for as regards cases where the remuneration originally agreed under a licence or a transfer of rights clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer. All revenues relevant to the case in question, including, where applicable, merchandising revenues, should be taken into account for the assessment of whether the remuneration is disproportionately low. The assessment of the situation should take account of the specific circumstances of each case, including the contribution of the author or performer, as well as of the specificities and remuneration practices relevant revenues worldwide with a regularity that is appropriate in the relevant sector, but at least annually. The information should be provided in a manner that is comprehensible to the author or performer and it should allow the effective assessment of the economic value of the rights in question. The transparency obligation should nevertheless apply only where copyright relevant rights are concerned. The processing of personal data, such as contact details and information on remuneration, that are necessary to keep authors and performers informed in relation to the exploitation of their works and performances, should be carried out in accordance with Article 6(1)(c) of Regulation (EU) 2016/679.

In order to ensure that exploitation-related information is duly provided to authors and performers also in cases where the rights have been sub-licensed to other parties who exploit the rights, this Directive entitles authors and performers to request additional relevant information on the exploitation of the rights, in cases where the first contractual counterpart has provided the information available to them, but that information is not sufficient to assess the economic value of their rights. That request should be made either directly to sub-licensees or through the contractual counterparts of authors and performers. Authors and performers, and their contractual counterparts, should be able to agree to keep the shared information confidential, but authors and performers should always be able to use the shared information for the purpose of exercising their rights under this Directive. Member States should have the option, in compliance with Union law, to provide for further measures to ensure transparency for authors and performers.

When implementing the transparency obligation provided for in this Directive, Member States should take into account the specificities of different content sectors, such as those of the music sector, the audiovisual sector and the publishing sector, and all relevant stakeholders should be involved when deciding on such sector-specific obligations. Where relevant, the significance of the contribution of authors and performers to the overall work or performance should also be considered. Collective bargaining should be considered as an option for the relevant stakeholders to reach an agreement regarding transparency. Such agreements should ensure that authors and performers have the same level of transparency as or a higher level of transparency than the minimum requirements provided for in this Directive. To enable the adaptation of existing reporting practices to the transparency obligation, a transitional period should be provided for. It should not be necessary to apply the transparency obligation in respect of agreements concluded between rightholders and collective management organisations, independent management entities or other entities subject to the national rules implementing Directive 2014/26/EU, as those organisations or entities are already subject to transparency obligations under Article 18 of Directive 2014/26/EU. Article 18 of Directive 2014/26/EU applies to organisations that manage copyright or related rights on behalf of more than one rightholder for the collective benefit of those rightholders. However, individually negotiated agreements concluded between rightholders and those of their contractual counterparts who act in their own interest should be subject to the transparency obligation provided for in this Directive.
Those representatives should protect the identity of the represented authors and performers for as long as that is possible. Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority. Such mechanism should not apply to contracts concluded by entities defined in Article 3(a) and (b) of Directive 2014/26/EU or by other entities subject to national rules implementing Directive 2014/26/EU.

(79) Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims by authors and performers, or by their representatives on their behalf, related to obligations of transparency and the contract adjustment mechanism. For that purpose, Member States should be able to either establish a new body or mechanism, or rely on an existing one that fulfils the conditions established by this Directive, irrespective of whether those bodies or mechanisms are industry-led or public, including when part of the national judiciary system. Member States should have flexibility in deciding how the costs of the dispute resolution procedure are to be allocated. Such alternative dispute resolution procedure should be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.

(80) When authors and performers license or transfer their rights, they expect their work or performance to be exploited. However, it could be the case that works or performances that have been licensed or transferred are not exploited at all. Where those rights have been transferred on an exclusive basis, authors and performers cannot turn to another partner to exploit their works or performances. In such a case, and after a reasonable period of time has elapsed, authors and performers should be able to benefit from a mechanism for the revocation of rights allowing them to transfer or license their rights to another person. As exploitation of works or performances can vary depending on the sectors, specific provisions could be laid down at national level in order to take into account the specificities of the sectors, such as the audiovisual sector, or of the works or performances, in particular providing for time frames for the right of revocation. In order to protect the legitimate interests of licensees and transferees of rights and to prevent abuses, and taking into account that a certain amount of time is needed before a work or performance is actually exploited, authors and performers should be able to exercise the right of revocation in accordance with certain procedural requirements and only after a certain period of time following the conclusion of the licence or of the transfer agreement. Member States should be allowed to regulate the exercise of the right of revocation in the case of works or performances involving more than one author or performer, taking into account the relative importance of the individual contributions.

(81) The provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive should be of a mandatory nature, and parties should not be able to derogate from those provisions, whether in contracts between authors, performers and their contractual counterparts, or in agreements between those counterparts and third parties, such as non-disclosure agreements. As a consequence, Article 3(4) of Regulation (EC) No 593/2008 of the European Parliament and of the Council (17) should apply to the effect that, where all other elements relevant to the situation at the time of the choice of applicable law are located in one or more Member States, the parties’ choice of applicable law other than that of a Member State does not prejudice the application of the provisions regarding transparency, contract adjustment mechanisms and alternative dispute resolution procedures laid down in this Directive, as implemented in the Member State of the forum.

(82) Nothing in this Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their works or other subject matter for free, including through non-exclusive free licences for the benefit of any users.

(83) Since the objective of this Directive, namely the modernisation of certain aspects of the Union copyright framework to take account of technological developments and new channels of distribution of protected content in the internal market, cannot be sufficiently achieved by Member States but can rather, by reason of their scale, effects and cross-border dimension, be better achieved at Union level, the Union may adopt measures in

accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(84) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles.

(85) Any processing of personal data under this Directive should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data set out in Articles 7 and 8, respectively, of the Charter and must be in compliance with Directive 2002/58/EC and Regulation (EU) 2016/679.

(86) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents (18), Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

HAVING ADOPTED THIS DIRECTIVE:

TITLE I
GENERAL PROVISIONS

Article 1
Subject matter and scope

1. This Directive lays down rules which aim to harmonise further Union law applicable to copyright and related rights in the framework of the internal market, taking into account, in particular, digital and cross-border uses of protected content. It also lays down rules on exceptions and limitations to copyright and related rights, on the facilitation of licences, as well as rules which aim to ensure a well-functioning marketplace for the exploitation of works and other subject matter.


Article 2
Definitions

For the purposes of this Directive, the following definitions apply:

(1) ‘research organisation’ means a university, including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research:

(a) on a not-for-profit basis or by reinvesting all the profits in its scientific research; or

(b) pursuant to a public interest mission recognised by a Member State;

in such a way that the access to the results generated by such scientific research cannot be enjoyed on a preferential basis by an undertaking that exercises a decisive influence upon such organisation;

(2) ‘text and data mining’ means any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations;

(3) ‘cultural heritage institution’ means a publicly accessible library or museum, an archive or a film or audio heritage institution;

(4) ‘press publication’ means a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which:

(a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;

(b) has the purpose of providing the general public with information related to news or other topics; and

(c) is published in any media under the initiative, editorial responsibility and control of a service provider.

Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive;

(5) ‘information society service’ means a service within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535;

(6) ‘online content-sharing service provider’ means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

Providers of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use, are not ‘online content-sharing service providers’ within the meaning of this Directive.

TITLE II

MEASURES TO ADAPT EXCEPTIONS AND LIMITATIONS TO THE DIGITAL AND CROSS-BORDER ENVIRONMENT

Article 3

Text and data mining for the purposes of scientific research

1. Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.

2. Copies of works or other subject matter made in compliance with paragraph 1 shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results.

3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.

4. Member States shall encourage rightholders, research organisations and cultural heritage institutions to define commonly agreed best practices concerning the application of the obligation and of the measures referred to in paragraphs 2 and 3 respectively.

Article 4

Exception or limitation for text and data mining

1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining.
2. Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining.

3. The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.

4. This Article shall not affect the application of Article 3 of this Directive.

**Article 5**

**Use of works and other subject matter in digital and cross-border teaching activities**

1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC and Article 15(1) of this Directive in order to allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, on condition that such use:

   (a) takes place under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff; and

   (b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

2. Notwithstanding Article 7(1), Member States may provide that the exception or limitation adopted pursuant to paragraph 1 does not apply or does not apply as regards specific uses or types of works or other subject matter, such as material that is primarily intended for the educational market or sheet music, to the extent that suitable licences authorising the acts referred to in paragraph 1 of this Article and covering the needs and specificities of educational establishments are easily available on the market.

   Member States that decide to avail of the first subparagraph of this paragraph shall take the necessary measures to ensure that the licences authorising the acts referred to in paragraph 1 of this Article are available and visible in an appropriate manner for educational establishments.

3. The use of works and other subject matter for the sole purpose of illustration for teaching through secure electronic environments undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.

4. Member States may provide for fair compensation for rightholders for the use of their works or other subject matter pursuant to paragraph 1.

**Article 6**

**Preservation of cultural heritage**

Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) of Directive 2009/24/EC and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation.

**Article 7**

**Common provisions**

1. Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable.

2. Article 5(5) of Directive 2001/29/EC shall apply to the exceptions and limitations provided for under this Title. The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to Articles 3 to 6 of this Directive.
TITLE III
MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT

CHAPTER 1
Out-of-commerce works and other subject matter

Article 8

Use of out-of-commerce works and other subject matter by cultural heritage institutions

1. Member States shall provide that a collective management organisation, in accordance with its mandates from rightholders, may conclude a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works or other subject matter that are permanently in the collection of the institution, irrespective of whether all rightholders covered by the licence have mandated the collective management organisation, on condition that:

(a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights that are the subject of the licence; and

(b) all rightholders are guaranteed equal treatment in relation to the terms of the licence.

2. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC, and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make available, for non-commercial purposes, out-of-commerce works or other subject matter that are permanently in their collections, on condition that:

(a) the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible; and

(b) such works or other subject matter are made available on non-commercial websites.

3. Member States shall provide that the exception or limitation provided for in paragraph 2 only applies to types of works or other subject matter for which no collective management organisation that fulfils the condition set out in point (a) of paragraph 1 exists.

4. Member States shall provide that all rightholders may, at any time, easily and effectively, exclude their works or other subject matter from the licensing mechanism set out in paragraph 1 or from the application of the exception or limitation provided for in paragraph 2, either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned.

5. A work or other subject matter shall be deemed to be out of commerce when it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public.

Member States may provide for specific requirements, such as a cut-off date, to determine whether works and other subject matter can be licensed in accordance with paragraph 1 or used under the exception or limitation provided for in paragraph 2. Such requirements shall not extend beyond what is necessary and reasonable, and shall not preclude being able to determine that a set of works or other subject matter as a whole is out of commerce, when it is reasonable to presume that all works or other subject matter are out of commerce.

6. Member States shall provide that the licences referred to in paragraph 1 are to be sought from a collective management organisation that is representative for the Member State where the cultural heritage institution is established.

7. This Article shall not apply to sets of out-of-commerce works or other subject matter if, on the basis of the reasonable effort referred to in paragraph 5, there is evidence that such sets predominantly consist of:

(a) works or other subject matter, other than cinematographic or audiovisual works, first published or, in the absence of publication, first broadcast in a third country;
(b) cinematographic or audiovisual works, of which the producers have their headquarters or habitual residence in a third country; or

(c) works or other subject matter of third country nationals, where after a reasonable effort no Member State or third country could be determined pursuant to points (a) and (b).

By way of derogation from the first subparagraph, this Article shall apply where the collective management organisation is sufficiently representative, within the meaning of point (a) of paragraph 1, of rightholders of the relevant third country.

**Article 9**

**Cross-border uses**

1. Member States shall ensure that licences granted in accordance with Article 8 may allow the use of out-of-commerce works or other subject matter by cultural heritage institutions in any Member State.

2. The uses of works and other subject matter under the exception or limitation provided for in Article 8(2) shall be deemed to occur solely in the Member State where the cultural heritage institution undertaking that use is established.

**Article 10**

**Publicity measures**

1. Member States shall ensure that information from cultural heritage institutions, collective management organisations or relevant public authorities, for the purposes of the identification of the out-of-commerce works or other subject matter, covered by a licence granted in accordance with Article 8(1), or used under the exception or limitation provided for in Article 8(2), as well as information about the options available to rightholders as referred to in Article 8(4), and, as soon as it is available and where relevant, information on the parties to the licence, the territories covered and the uses, is made permanently, easily and effectively accessible on a public single online portal from at least six months before the works or other subject matter are distributed, communicated to the public or made available to the public in accordance with the licence or under the exception or limitation.

   The portal shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.

2. Member States shall provide that, if necessary for the general awareness of rightholders, additional appropriate publicity measures are taken regarding the ability of collective management organisations to license works or other subject matter in accordance with Article 8, the licences granted, the uses under the exception or limitation provided for in Article 8(2) and the options available to rightholders as referred to in Article 8(4).

   The appropriate publicity measures referred to in the first subparagraph of this paragraph shall be taken in the Member State where the licence is sought in accordance with Article 8(1) or, for uses under the exception or limitation provided for in Article 8(2), in the Member State where the cultural heritage institution is established. If there is evidence, such as the origin of the works or other subject matter, to suggest that the awareness of rightholders could be more efficiently raised in other Member States or third countries, such publicity measures shall also cover those Member States and third countries.

**Article 11**

**Stakeholder dialogue**

Member States shall consult rightholders, collective management organisations and cultural heritage institutions in each sector before establishing specific requirements pursuant to Article 8(5), and shall encourage regular dialogue between representative users' and rightholders' organisations, including collective management organisations, and any other relevant stakeholder organisations, on a sector-specific basis, to foster the relevance and usability of the licensing mechanisms set out in Article 8(1) and to ensure that the safeguards for rightholders referred to in this Chapter are effective.
CHAPTER 2

Measures to facilitate collective licensing

Article 12

Collective licensing with an extended effect

1. Member States may provide, as far as the use on their territory is concerned and subject to the safeguards provided for in this Article, that where a collective management organisation that is subject to the national rules implementing Directive 2014/26/EU, in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject matter:

(a) such an agreement can be extended to apply to the rights of rightholders who have not authorised that collective management organisation to represent them by way of assignment, licence or any other contractual arrangement; or

(b) with respect to such an agreement, the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly.

2. Member States shall ensure that the licensing mechanism referred to in paragraph 1 is only applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned, and shall ensure that such licensing mechanism safeguards the legitimate interests of rightholders.

3. For the purposes of paragraph 1, Member States shall provide for the following safeguards:

(a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights which are the subject of the licence, for the relevant Member State;

(b) all rightholders are guaranteed equal treatment, including in relation to the terms of the licence;

(c) rightholders who have not authorised the organisation granting the licence may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism established in accordance with this Article; and

(d) appropriate publicity measures are taken, starting from a reasonable period before the works or other subject matter are used under the licence, to inform rightholders about the ability of the collective management organisation to license works or other subject matter, about the licensing taking place in accordance with this Article and about the options available to rightholders as referred to in point (c). Publicity measures shall be effective without the need to inform each rightholder individually.

4. This Article does not affect the application of collective licensing mechanisms with an extended effect in accordance with other provisions of Union law, including provisions that allow exceptions or limitations.

This Article shall not apply to mandatory collective management of rights.

Article 7 of Directive 2014/26/EU shall apply to the licensing mechanism provided for in this Article.

5. Where a Member State provides in its national law for a licensing mechanism in accordance with this Article, that Member State shall inform the Commission about the scope of the corresponding national provisions, about the purposes and types of licences that may be introduced under those provisions, about the contact details of organisations issuing licences in accordance with that licensing mechanism, and about the means by which information on the licensing and on the options available to rightholders as referred to in point (c) of paragraph 3 can be obtained. The Commission shall publish that information.

6. Based on the information received pursuant to paragraph 5 of this Article and on the discussions within the contact committee established in Article 12(3) of Directive 2001/29/EC, the Commission shall, by 10 April 2021, submit to the European Parliament and to the Council a report on the use in the Union of the licensing mechanisms referred to in paragraph 1 of this Article, their impact on licensing and rightholders, including rightholders who are not members of the organisation granting the licences or who are nationals of, or resident in, another Member State, their effectiveness in facilitating the dissemination of cultural content, and their impact on the internal market, including the cross-border provision of services and competition. That report shall be accompanied, if appropriate, by a legislative proposal, including as regards the cross-border effect of such national mechanisms.
CHAPTER 3

Access to and availability of audiovisual works on video-on-demand platforms

Article 13

Negotiation mechanism

Member States shall ensure that parties facing difficulties related to the licensing of rights when seeking to conclude an agreement for the purpose of making available audiovisual works on video-on-demand services may rely on the assistance of an impartial body or of mediators. The impartial body established or designated by a Member State for the purpose of this Article and mediators shall provide assistance to the parties with their negotiations and help the parties reach agreements, including, where appropriate, by submitting proposals to them.

Member States shall notify the Commission of the body or mediators referred to in the first paragraph no later than 7 June 2021. Where Member States have chosen to rely on mediation, the notification to the Commission shall at least include, when available, the source where relevant information on the mediators entrusted can be found.

CHAPTER 4

Works of visual art in the public domain

Article 14

Works of visual art in the public domain

Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.

TITLE IV

MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT

CHAPTER 1

Rights in publications

Article 15

Protection of press publications concerning online uses

1. Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers.

The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users.

The protection granted under the first subparagraph shall not apply to acts of hyperlinking.

The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication.

2. The rights provided for in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject matter incorporated in a press publication. The rights provided for in paragraph 1 shall not be invoked against those authors and other rightholders and, in particular, shall not deprive them of their right to exploit their works and other subject matter independently from the press publication in which they are incorporated.
When a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights provided for in paragraph 1 shall not be invoked to prohibit the use by other authorised users. The rights provided for in paragraph 1 shall not be invoked to prohibit the use of works or other subject matter for which protection has expired.


4. The rights provided for in paragraph 1 shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published.

Paragraph 1 shall not apply to press publications first published before 6 June 2019.

5. Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.

**Article 16**

**Claims to fair compensation**

Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right.

The first paragraph shall be without prejudice to existing and future arrangements in Member States concerning public lending rights.

**CHAPTER 2**

**Certain uses of protected content by online services**

**Article 17**

**Use of protected content by online content-sharing service providers**

1. Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.

2. Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues.

3. When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.

The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to those service providers for purposes falling outside the scope of this Directive.

4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:

(a) made best efforts to obtain an authorisation, and

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

5. In determining whether the service provider has complied with its obligations under paragraph 4, and in light of the principle of proportionality, the following elements, among others, shall be taken into account:

(a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and

(b) the availability of suitable and effective means and their cost for service providers.

6. Member States shall provide that, in respect of new online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC (20), the conditions under the liability regime set out in paragraph 4 are limited to compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject matter or to remove those works or other subject matter from their websites.

Where the average number of monthly unique visitors of such service providers exceeds 5 million, calculated on the basis of the previous calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.

7. The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

(a) quotation, criticism, review;

(b) use for the purpose of caricature, parody or pastiche.

8. The application of this Article shall not lead to any general monitoring obligation.

Member States shall provide that online content-sharing service providers provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

9. Member States shall provide that online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.

Where rightholders request to have access to their specific works or other subject matter disabled or to have those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review. Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights.

This Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679.

Online content-sharing service providers shall inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

10. As of 6 June 2019 the Commission, in cooperation with the Member States, shall organise stakeholder dialogues to discuss best practices for cooperation between online content-sharing service providers and rightholders. The Commission shall, in consultation with online content-sharing service providers, rightholders, users' organisations and other relevant stakeholders, and taking into account the results of the stakeholder dialogues, issue guidance on the application of this Article, in particular regarding the cooperation referred to in paragraph 4. When discussing best practices, special account shall be taken, among other things, of the need to balance fundamental rights and of the use of exceptions and limitations. For the purpose of the stakeholder dialogues, users' organisations shall have access to adequate information from online content-sharing service providers on the functioning of their practices with regard to paragraph 4.

CHAPTER 3

Fair remuneration in exploitation contracts of authors and performers

Article 18

Principle of appropriate and proportionate remuneration

1. Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.

2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.

Article 19

Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specifics of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.

2. Member States shall ensure that, where the rights referred to in paragraph 1 have subsequently been licensed, authors and performers or their representatives shall, at their request, receive from sub-licensees additional information, in the event that their first contractual counterpart does not hold all the information that would be necessary for the purposes of paragraph 1.

Where that additional information is requested, the first contractual counterpart of authors and performers shall provide information on the identity of those sub-licensees.
Member States may provide that any request to sub-licensees pursuant to the first subparagraph is made directly or indirectly through the contractual counterpart of the author or the performer.

3. The obligation set out in paragraph 1 shall be proportionate and effective in ensuring a high level of transparency in every sector. Member States may provide that in duly justified cases where the administrative burden resulting from the obligation set out in paragraph 1 would become disproportionate in the light of the revenues generated by the exploitation of the work or performance, the obligation is limited to the types and level of information that can reasonably be expected in such cases.

4. Member States may decide that the obligation set out in paragraph 1 of this Article does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance, unless the author or performer demonstrates that he or she requires the information for the exercise of his or her rights under Article 20(1) and requests the information for that purpose.

5. Member States may provide that, for agreements subject to or based on collective bargaining agreements, the transparency rules of the relevant collective bargaining agreement are applicable, on condition that those rules meet the criteria provided for in paragraphs 1 to 4.

6. Where Article 18 of Directive 2014/26/EU is applicable, the obligation laid down in paragraph 1 of this Article shall not apply in respect of agreements concluded by entities defined in Article 3(a) and (b) of that Directive or by other entities subject to the national rules implementing that Directive.

Article 20

Contract adjustment mechanism

1. Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.

2. Paragraph 1 of this Article shall not apply to agreements concluded by entities defined in Article 3(a) and (b) of Directive 2014/26/EU or by other entities that are already subject to the national rules implementing that Directive.

Article 21

Alternative dispute resolution procedure

Member States shall provide that disputes concerning the transparency obligation under Article 19 and the contract adjustment mechanism under Article 20 may be submitted to a voluntary, alternative dispute resolution procedure. Member States shall ensure that representative organisations of authors and performers may initiate such procedures at the specific request of one or more authors or performers.

Article 22

Right of revocation

1. Member States shall ensure that where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter.

2. Specific provisions for the revocation mechanism provided for in paragraph 1 may be provided for in national law, taking into account the following:

(a) the specificities of the different sectors and the different types of works and performances; and

(b) where a work or other subject matter contains the contribution of more than one author or performer, the relative importance of the individual contributions, and the legitimate interests of all authors and performers affected by the application of the revocation mechanism by an individual author or performer.
Member States may exclude works or other subject matter from the application of the revocation mechanism if such works or other subject matter usually contain contributions of a plurality of authors or performers.

Member States may provide that the revocation mechanism can only apply within a specific time frame, where such restriction is duly justified by the specificities of the sector or of the type of work or other subject matter concerned.

Member States may provide that authors or performers can choose to terminate the exclusivity of the contract instead of revoking the licence or transfer of the rights.

3. Member States shall provide that the revocation provided for in paragraph 1 may only be exercised after a reasonable time following the conclusion of the licence or the transfer of the rights. The author or performer shall notify the person to whom the rights have been licensed or transferred and set an appropriate deadline by which the exploitation of the licensed or transferred rights is to take place. After the expiry of that deadline, the author or performer may choose to terminate the exclusivity of the contract instead of revoking the licence or the transfer of the rights.

4. Paragraph 1 shall not apply if the lack of exploitation is predominantly due to circumstances that the author or the performer can reasonably be expected to remedy.

5. Member States may provide that any contractual provision derogating from the revocation mechanism provided for in paragraph 1 is enforceable only if it is based on a collective bargaining agreement.

Article 23

Common provisions

1. Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers.

2. Member States shall provide that Articles 18 to 22 of this Directive do not apply to authors of a computer program within the meaning of Article 2 of Directive 2009/24/EC.

TITLE V

FINAL PROVISIONS

Article 24

Amendments to Directives 96/9/EC and 2001/29/EC

1. Directive 96/9/EC is amended as follows:

(a) In Article 6(2), point (b) is replaced by the following:

‘(b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790 of the European Parliament and of the Council (*);


(b) In Article 9, point (b) is replaced by the following:

‘(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790.’
2. Directive 2001/29/EC is amended as follows:

(a) In Article 5(2), point (c) is replaced by the following:

'(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790 of the European Parliament and of the Council (*);


(b) In Article 5(3), point (a) is replaced by the following:

'(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790;'.

(c) In Article 12(4), the following points are added:

'(e) to examine the impact of the transposition of Directive (EU) 2019/790 on the functioning of the internal market and to highlight any transposition difficulties;

(f) to facilitate the exchange of information on relevant developments in legislation and case law as well as on the practical application of the measures taken by Member States to implement Directive (EU) 2019/790;

(g) to discuss any other questions arising from the application of Directive (EU) 2019/790.:

Article 25

Relationship with exceptions and limitations provided for in other directives

Member States may adopt or maintain in force broader provisions, compatible with the exceptions and limitations provided for in Directives 96/9/EC and 2001/29/EC, for uses or fields covered by the exceptions or limitations provided for in this Directive.

Article 26

Application in time

1. This Directive shall apply in respect of all works and other subject matter that are protected by national law in the field of copyright on or after 7 June 2021.

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 7 June 2021.

Article 27

Transitional provision

Agreements for the licence or transfer of rights of authors and performers shall be subject to the transparency obligation set out in Article 19 as from 7 June 2022.

Article 28

Protection of personal data

The processing of personal data carried out within the framework of this Directive shall be carried out in compliance with Directive 2002/58/EC and Regulation (EU) 2016/679.
**Article 29**

**Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 7 June 2021. They shall immediately inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

**Article 30**

**Review**

1. No sooner than 7 June 2026, the Commission shall carry out a review of this Directive and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.

The Commission shall, by 7 June 2024, assess the impact of the specific liability regime set out in Article 17 applicable to online content-sharing service providers that have an annual turnover of less than EUR 10 million and the services of which have been available to the public in the Union for less than three years under Article 17(6) and, if appropriate, take action in accordance with the conclusions of its assessment.

2. Member States shall provide the Commission with the necessary information for the preparation of the report referred to in paragraph 1.

**Article 31**

**Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the [Official Journal of the European Union](https://olaf.europa.eu/eli/dir/2019/253/oj).}

**Article 32**

**Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 17 April 2019.

*For the European Parliament*

The President

A. TAJANI

For the Council

The President

G. CIAMBA
HOW LAW MADE SILICON VALLEY

Anupam Chander*

ABSTRACT

Explanations for the success of Silicon Valley focus on the confluence of capital and education. In this Article, I put forward a new explanation, one that better elucidates the rise of Silicon Valley as a global trader. Just as nineteenth-century American judges altered the common law in order to subsidize industrial development, American judges and legislators altered the law at the turn of the Millennium to promote the development of Internet enterprise. Europe and Asia, by contrast, imposed strict intermediary liability regimes, inflexible intellectual property rules, and strong privacy constraints, impeding local Internet entrepreneurs. This study challenges the conventional wisdom that holds that strong intellectual property rights undergird innovation. While American law favored both commerce and speech enabled by this new medium, European and Asian jurisdictions attended more to the risks to intellectual property rights holders and, to a lesser extent, ordinary individuals. Innovations that might be celebrated in the United States could lead to imprisonment in Japan. I show how American companies leveraged their liberal home base to become global leaders in cyberspace. I argue that nations seeking to incubate their own Silicon Valley must focus on freeing speech, and so must the United States, if it hopes not to break this new industry.

* Professor of Law, University of California, Davis, and Director, California International Law Center; J.D., Yale Law School; A.B., Harvard College. For insightful comments, I thank Jack Balkin, Ash Bhagwat, Mario Biagioli, James Boyle, Eoin Carolan, Jens Dammann, Deven Desai, Stephen Diamond, Bill Dodge, Eric Goldman, Sung Gi Hwang, Suchul Kim, Tom Joo, Carlton Larson, Mark Lemley, Fred von Lohmann, Deirdre Mulligan, Pierluigi Perri, Markku Räsänen, Haochen Sun, Madhavi Sunder, Louis Trager, Mark Wu, and Kyu Ho Youm. Similarly, I thank participants in colloquia at the Yale Information Society Project; the Berkeley Globalization and Information Technology Center; the New York Law School Global Law and Policy Roundtable, Stanford Law School Law, Science and Technology Program; the UC Davis Center for Science and Innovation Studies, the Northern California International Law Scholars Conference; and Zhejiang University Guanghua Law School. I am grateful to Sarah Anker, Uyên Lê, Dimple Patel, Chia-Fen Jennifer Yu, and Louis Wai for excellent research assistance. I am grateful as well to Google, for Google Research Awards supporting this and related research.
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INTRODUCTION

Nearly every company set up in a garage in Silicon Valley hopes to take over the world. There is reason for such optimism. Again and again, Silicon Valley firms have become the world’s leading providers of Internet services. How did Silicon Valley become the world’s leading supplier of Internet services?

Popular explanations for Silicon Valley’s recent success revolve around two features. First, Silicon Valley bestrides the great academic centers of Stanford University and the University of California, Berkeley, and sits near the artistic and intellectual hub of San Francisco. Second, the center of venture capital in the United States also happens to be in Menlo Park, California, allowing both industries to profit from each other in a symbiotic relationship. But education and money coincide in other parts of the United States as well. Why did those parts not prosper in the manner of Silicon Valley? More fundamentally, did not the Internet make geography irrelevant? Scholars answer that Silicon Valley’s advantage lies in the economies of agglomeration. Ronald Gilson argued that California’s advantage was its labor law, which he believes encourages “knowledge spillovers” and agglomeration economies by facilitating employee mobility. While these standard accounts do much to explain the dynamism of Silicon Valley relative to other parts of the United States, they do not explain the relative absence of such Internet

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1 This Article was inspired by the research and writing of a subsection, also called “How Law Made Silicon Valley,” in a recent book by the author. See ANUPAM CHANDER, THE ELECTRONIC SILK ROAD: HOW THE WEB BINDS THE WORLD IN COMMERCE 55–58 (2013). Some portions of this Article’s introduction were previously published in that book. See id.

2 ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128, at 6, 8 (1994) (“Dense networks of social relations play an important role in integrating the firms in Silicon Valley’s fragmented industrial structure.”). In more recent work, Saxenian describes how diasporas help power innovation across the world. ANNALEE SAXENIAN, THE NEW ARGONAUTS: REGIONAL ADVANTAGE IN A GLOBAL ECONOMY (2006).

3 Ronald J. Gilson, The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete, 74 N.Y.U. L. REV. 575, 578 (1999) (“Postemployment covenants not to compete have the potential to restrict seriously the movement of employees between existing firms and to startups and, hence, to restrict seriously employee-transmitted knowledge spillovers.”); see also James Pooley & Mark Lemley, California Restrictive Employee Covenants After Edwards, 23 CAL. LAB. & EMP. L. REV., Jan. 2009, at 3, 29 (“California’s long-standing ban on employee covenants not to compete is a centerpiece of state innovation policy, and it is perhaps the most important reason why California has enjoyed its leading position in the technology industries over the past twenty-five years.”); Daniel B. Rodriguez & David Schleicher, The Location Market, 19 GEO. MASON L. REV. 637, 640–47 (2012) (describing “agglomeration economies”).
innovation hubs outside the United States, or the success of Silicon Valley enterprises across the world.⁴

Law played a far more significant role in Silicon Valley’s rise and its global success than has been previously understood. It enabled the rise of Silicon Valley while simultaneously disabling the rise of competitors across the world. In this Article, I will argue that Silicon Valley’s success in the Internet era has been due to key substantive reforms to American copyright and tort law that dramatically reduced the risks faced by Silicon Valley’s new breed of global traders.⁵ Specifically, legal innovations in the 1990s that reduced liability concerns for Internet intermediaries, coupled with low privacy protections, created a legal ecosystem that proved fertile for the new enterprises of what came to be known as Web 2.0. I will argue that this solicitude was not accidental—but rather a kind of cobbled industrial policy favoring Internet entrepreneurs. In a companion paper, Uyên Lê and I show that these aspects of copyright and tort law were not driven by commercial considerations alone, but were undergirded in large part by a constitutional commitment to free speech.⁶ As we argue there, a First Amendment-infused legal culture that prizes speech offered an ideal environment in which to build the speech platforms that make up Web 2.0.

I will compare the legal regimes not between Silicon Valley and Boston’s Route 128, but between the United States and key technological competitors across the globe. The indulgence of American law for Internet enterprise appears in sharper relief when contrasted with the legal regimes faced by web entrepreneurs elsewhere. In Europe, concerns about copyright violations and strict privacy protections hobbled Internet startups. Asian web enterprises faced not only copyright and privacy constraints, but also strict intermediary liability rules. I will contrast the leading cyberlaw statutes and cases in the United States, with their explicit embrace of commerce and speech, with those

⁴ Tim Devaney & Tom Stein, Can Ireland Offer Startups Something Silicon Valley Can’t?, READWRITE (Dec. 24, 2012), http://readwrite.com/2012/12/24/can-ireland-offer-startups-something-silicon-valley-cant (Even though “just about every country with a high-speed network and a national budget has hatched a ‘startup ecosystem[,]’ . . . [n]one has succeeded. The Dropboxes and Instagrams of the world still flock to the original Silicon Valley.”).  
⁵ My focus here is on Silicon Valley in its current non-silicon-based-life form, not its previous incarnations. For an account of the rise of early industry in the region, see Christophe LéCuyer, Making Silicon Valley: Innovation and the Growth of High Tech, 1930–1970 (2006).  
from Europe and Asia, which are more attant to the risks of this new medium for existing interests. I will show that Google and Yahoo were so worried that Japanese copyright law would make search engines illegal that they placed their search servers offshore.7 A Japanese computer science professor advised his students to publish their software outside Japan.8 British Prime Minister David Cameron suggested that Google’s search engine might have been illegal under English copyright law.9

This Article upends the conventional wisdom, which sees strong intellectual property protections as the key to innovation—what the World Intellectual Property Organization calls a “power tool” for growth.10 Understanding the reasons for Silicon Valley’s global success is of more than historical interest. Governments across the world, from Chile to Kenya to Russia, seek to incubate the next Silicon Valley.11 My review suggests that overly rigid intellectual property laws can prove a major hurdle to Internet innovations, which rely fundamentally on empowering individuals to share with each other. This study helps make clear what is at stake in debates over new laws such as the Stop Online Piracy Act (SOPA) and its relatives, highlighting the effect of these laws on Silicon Valley’s capacity for

7 See infra notes 202–04 and accompanying text.
8 See infra notes 205–06 and accompanying text.
9 See infra notes 123–25 and accompanying text.
innovation. I show that government has the power to enable, or disable, a new industry. The power to make in this case implies the power to break.

Innovation scholars worry about the “valley of death,” the stage between start-up idea and successful commercialization, in which most start-up enterprises founder. Cyber scholars fond of citing Joseph Schumpeter’s “creative destruction” need to attend to his focus as well on the finance needed by innovators. Imagine the boardroom in a Silicon Valley venture capital firm, circa 2005. A start-up less than a year old has already attracted millions of users. Now that start-up, which is bleeding money, needs an infusion of cash to survive and scale up. The start-up lets people share text, photos, and videos, and includes the ability to readily share text, pictures, and videos posted by one’s friends. If that start-up can be accused of abetting copyright infringement on a massive scale, or must police its content like a traditional publishing house lest it face damages claims or an injunction, your hundred-million-dollar investment might simply vanish to plaintiffs’ lawyers in damages and fees.

12 Moves that might further hamstring Internet enterprises are under consideration elsewhere as well. For example, a draft communiqué from the Organization for Economic Cooperation and Development proposes to take away some of the liability protections that intermediaries have for copyright infringement. Rick Mitchell, OECD Says Net Policy Should Protect IP Rights, but Limit Provider Liability, 16 ELECTRONIC COM. & L. REP. 1168 (2011).


14 Vicki Loise & Ashley J. Stevens, The Bayh-Dole Act Turns 30, 45 LES NOUVELLES 185, 192 & n.35 (2010) (noting that the phrase was “popularized by Congressman Vernon Ehlers, himself a Ph.D. physicist when the term was used in a Report to Congress by the Science Committee, of which he was Vice-Chair in 1998”).

15 Schumpeter, who served as Finance Minister of Austria in 1919, described the banker as “the ephor of the exchange economy.” JOSEPH A. SCHUMPETER, THE THEORY OF ECONOMIC DEVELOPMENT 74 (Redvers Opie trans., 1934).

16 This hypothetical finds real-world inspiration in a recent story. Matt Lynley, Pinterest: We’re Not Going to Be Sued into Oblivion, and Here’s Why, BUSINESS INSIDER (Mar. 9, 2012, 3:01 PM), http://www.businessinsider.com/pinterest-were-not-going-to-be-sued-into-oblivion-and-heres-why-2012-3; Hayley
An injunction might stop the site from continuing without extensive human monitoring that could not be justified by potential revenues. Because of the insulation brought by U.S. law reforms in the 1990s, American start-ups did not fear a mortal legal blow. The legal privileges granted to Internet enterprises in the United States helped start-ups bridge the valley of death.

Let me anticipate criticism. First, legal realists might object that I have spoken about law on the books. What about law in action? I demonstrate through actual cases the practical importance of the liberal American law and the strict European and Asian laws. Second, some might seek to trivialize my thesis: law always matters to the success of an enterprise because it could have made that enterprise illegal, but did not. That is not my claim; rather, my claim is that U.S. authorities (but not those in other technologically advanced states) acted with deliberation to encourage new Internet enterprises by both reducing the legal risks they faced and largely refraining from regulating the new risks they introduced. Third, some will insist that if law was relevant, it was only because it got out of the way. After all, the last person hired at a Silicon Valley start-up is the lawyer. The story of Silicon Valley is not only a story of brilliant programmers in their garages, but also a legal environment specifically shaped to accommodate their creations.

My claim may resonate with students of American legal history. Morton Horwitz famously argued that nineteenth-century American courts modified liability rules to favor the coming of industrialization.17 I suggest an even more widespread effort, with the Executive, Congress, and the Courts, each in their own way promoting Internet enterprise. Horwitz decried the nineteenth-century’s laws’ implicit subsidy to industrialists, which he saw as being borne on the backs of society’s least fortunate.18 The limitations on Internet intermediary liability and the lack of omnibus privacy protections beyond those that are promised contractually by websites mean that there is a price to be paid for the amazing innovation of the past two decades. Even while we celebrate innovation, we must recognize its costs.

Tsukayama, Pinterest Addresses Copyright Concerns, WASH. POST (Mar. 15, 2012), http://articles.washingtonpost.com/2012-03-15/business/35447213_1_ben-silbermann-pinterest-content; see also infra note 292 and accompanying text.


18 See infra notes 274–75 and accompanying text.
I do not allege the discovery of the DNA for economic development in the Information Age. The cyberlaw I describe here must be understood against the broader legal, cultural, and economic background in particular societies. What works in one jurisdiction might not work elsewhere because of differences in the role of law, the role of norms, enforcement, and other features. At the same time, a comparative exercise is highly instructive, offering experience with different methods of achieving a desired result. It also helps us recognize the impact of differing legal cultures (including what James Whitman has called “the two Western cultures of privacy”) on such values as speech and enterprise.

This Article proceeds as follows. Part I reveals how American legislators and courts altered the law to accommodate new Internet enterprises. Part II shows that European and Asian nations offered relatively stricter intermediary liability regimes and privacy protections, making illegal the new business model embraced by their American counterparts. Part III calls for due attention to the hidden price of innovation in order to avoid the “wow” to “yuck” curve—the move from dazzlement to disgust that scholars have identified for other new technologies.

19 Law and development scholar Kevin Davis observes two significant reasons why universal claims are likely to fail:

First, the law may not be necessary to induce the outcome in question because the presence of certain other factors is sufficient; in other words, there may be substitutes for the law. A second possibility is that the law is not sufficient to generate the outcome in question; in other words, there may be complements for the law, in the absence of which it has no impact.


20 Ralf Michaels, The Functional Method of Comparative Law, in The Oxford Handbook of Comparative Law 339, 351 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (“If law fulfills functions and meets societal needs, then the lawyer’s job is to develop laws that perform these tasks (‘social engineering’), and comparative law can help compare the ability of different solutions to solve similar problems, and spur similar degrees of progress.”).


22 In another paper, yet a work in progress, I will show how Silicon Valley firms leveraged their liberal home jurisdiction to conquer the world.

I. MAKING AMERICA SAFE FOR SILICON VALLEY

I review here key legal developments that enabled the rise of Web 2.0. Each of the individual stories I tell in this Part may seem familiar.24 Yet, by weaving these stories together, one begins to see a stunning pattern in the larger narrative. The pattern appears even sharper when contrasted with my survey of Europe and Asia in Part II.

In the last decade of the Millennium, the infant industry spawned by the invention of the World Wide Web posed pressing challenges. How could we protect children from being awash in pornography?25 Would early Internet pioneers such as AOL and Yahoo fail in the face of claims that they abetted defamation and other wrongs?26 Would Hollywood disappear in the face of easy and perfect digital copying through services such as Napster? Could we protect children from communicating with dangerous adults?27 Would companies be at the mercy of individuals who were quicker to register corporate trademarks as domain names?28 Would contracts entered into online, paired with the 1996 Communications Decency Act, which provides similar immunity against noncopyright claims like defamation, the DMCA made it possible for everyone from Digg to WordPress to provide forums for users without constant fear of being sued out of existence.

“These two protections for intermediaries have been absolutely crucial for giving us the internet today,” says Fred von Lohmann, an internet attorney with the Electronic Frontier Foundation . . . . “You could not run a blog without these. You couldn’t run MySpace, AOL without these two things.”

David Kravets, 10 Years Later, Misunderstood DMCA Is the Law That Saved the Web, WIRED (Oct. 27, 2008, 3:01 PM), http://www.wired.com/threatlevel/2008/10/ten-years-later/

24 See, e.g., Brief of Amici Curiae Center for Democracy & Technology and Electronic Frontier Foundation Supporting Appellees and Urging Affirmance at 4, Doe v. SexSearch.com, 551 F.3d 412 (6th Cir. 2008) (No. 07-4182) (“With this broad immunity against all civil claims, Section 230 has successfully promoted free speech and innovations on the Internet.”); Cecilia Ziniti, Note, The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got It Right and Web 2.0 Proves It, 23 BERKELEY TECH. L.J. 583 (2008). One Wired news piece even observes the connection between the CDA and the DMCA:

Paried with the 1996 Communications Decency Act, which provides similar immunity against noncopyright claims like defamation, the DMCA made it possible for everyone from Digg to WordPress to provide forums for users without constant fear of being sued out of existence.

“Those two protections for intermediaries have been absolutely crucial for giving us the internet today,” says Fred von Lohmann, an internet attorney with the Electronic Frontier Foundation . . . . “You could not run a blog without these. You couldn’t run MySpace, AOL without these two things.”

See AOL Again Involved in Complex Speech Issue, COMM. DAILY, Sept. 30, 1997, available at 1997 WLNR 3620335 (“Governor [Jim Geringer] also said that if AOL didn’t change its policy, ‘parents in Wyoming who are using AOL should discuss whether they can support a company that allows the promotion of torture, rape and murder.’”).


26 See Joshua Quittner, Billions Registered, WIRED, Oct. 1994, at 50 (discussing the speculative practice of domain name purchases in the early 1990s).
lacking an ink signature, prove unenforceable? 29 Would e-commerce be saddled with multiple tax obligations from the thousands of taxing jurisdictions across the country? 30

The Clinton Administration published a white paper outlining its vision for “Global Electronic Commerce.” 31 Announcing the report, President Clinton presciently observed, “Governments can have a profound effect on the growth of electronic commerce. By their actions, they can facilitate electronic trade or inhibit it.” 32 The report concluded that “[e]xisting laws and regulations that may hinder electronic commerce should be reviewed and revised or eliminated to reflect the needs of the new electronic age.” 33 Most importantly, it declared the Administration’s commitment to self-regulation: the first principle announced that “[t]he private sector should lead,” and the second principle that “[g]overnments should avoid undue restrictions on electronic commerce.” 34 That preference for self-regulation over governmental intrusions would mark congressional activity during this period. This meant even carving out Internet enterprises from the reach of existing law. The Administration’s simple mandate: “Let a thousand Web sites bloom.” 35

Congress responded to the rise of the Internet with a flurry of laws. These are the laws of this fruitful period, in chronological order: the Communications Decency Act of 1996 (CDA), 36 the Internet Tax Freedom Act, 37 the Children’s Online Privacy Protection Act of 1998 (COPPA), 38 the Digital Millennium Copyright Act (DMCA), 39 the Anticybersquatting Consumer Protection Act

29 Geanne Rosenberg, Legal Uncertainty Clouds Status of Contracts on Internet, N.Y. TIMES, July 7, 1997, at D3 (“[B]usiness managers, corporate lawyers and legal scholars [are] uncertain about the enforceability of electronic agreements. The uncertainty has had a chilling effect, even at computer-astute places . . . . Lawmakers are scrambling to fill the gap between technology and the law.”).
32 Message to Internet Users on Electronic Commerce, 2 PUB. PAPERS 901, 902 (July 1, 1997).
33 CLINTON & GORE, supra note 31.
34 Id.
and the Electronic Signatures in Global and National Commerce Act (E-Sign).41

Taken together, these statutes helped undergird a legal framework that proved conducive to the development of Internet-based services. While the titles of these statutes often professed consumer-oriented goals—a remarkable list including decency, tax freedom, privacy, and consumer protection—commercial concerns were never far from the table, as we will see. I review below the CDA and the DMCA, statutes that proved especially significant for Silicon Valley enterprises over the course of the following decade.42 I also consider the crucial judicial interpretations that bent the law to foster web innovation.

We see that each of the branches of government played an integral part in this endeavor. In the face of calls for legal protections, the Clinton Administration promoted self-regulation by the Internet industry. Congress wrote a set of statutes that dealt with some of the principal concerns of both the content industry and the public, without placing too much in the way of burdensome constraints on Silicon Valley enterprise. The Courts, for their part, sought to protect speech and promote innovation by reading immunity statutes broadly and striking down statutes that might chill speech. At the same time, each of the branches checked the others when they proved less than friendly to Internet innovation. Congress embraced the DMCA’s Title II, even where the Clinton Administration was initially inclined to favor copyright holders; the

42 The other statutes proved useful, each in its own way. The Internet Tax Freedom Act helped inform the widespread (if erroneous) view that Internet commerce was a tax-free zone. Rather than a tax holiday for transactions conducted via the Internet, the statute simply banned special taxes that discriminated against the Internet or taxes on obtaining Internet service to one’s home or business. By banning taxes on Internet access, the statute made Internet access itself cheaper. The perception that Internet-mediated transactions were tax-free likely contributed to the willingness of many individuals to buy goods from unseen and often unfamiliar online merchants, helping companies like eBay and Amazon. The Anticybersquatting Consumer Protection Act helped alleviate the concerns of trademark holders during the rapid development of cyberspace. E-Sign helped assure the acceptance of painless electronic contracting, imposing no formal requirements on contracts executed via the Internet. E-Sign overrode efforts such as those in Utah to require a particular technology for clearly enforceable contracts—an approach that might have created a cumbersome obstacle to widespread adoption of Internet contracting. Jane K. Winn & Robert A. Witte, E-Sign of the Times, E-COMMERCE L. REP., July 2000, at 2, 8.
Courts declared unconstitutional the anti-pornography restrictions imposed by Congress; and Congress offered safe harbors for intermediary liability even where courts were sometimes inclined to impose broader liability. Thus, this was a cobbled industrial policy, halting and inconsistent, yet ultimately adding up to a powerful set of pro-Internet laws.

A. Intermediary Liability

The first of this series of statutes, the Communications Decency Act, proved central to the rise of the new breed of Silicon Valley enterprise. This hardly seemed likely for a statute directed against indecent speech. The CDA made it a crime to display obscene or indecent material to persons who were less than eighteen years of age, unless the site had taken appropriate measures such as an age-verified credit card to restrict access to adults. 43 Hidden within the statute was a small fateful section, § 230, 44 that would save many corporations—most of them not even dreamed of when the Act was passed—from potentially ruinous legal challenges.

What risks did such firms face? By offering platforms for users across the world, Internet enterprises faced the hazard that some users would use these platforms in ways that violated the law, bringing with it the possibility of liability for aiding and abetting that illegal activity. Consider a sampling of the array of claims that might lie against these platforms for the behavior of their users. Yahoo might be liable if someone uses Yahoo Finance to circulate a false rumor about a public company. Match.com could face liability if a conniving user posted defamatory information about another individual. Craigslist might be liable under fair housing statutes if a landlord put up a listing stating that he preferred to rent to people of a particular race. Amazon and Yelp might be liable for defamatory comments written by a few of their legions of reviewers.

The risks were made apparent in 1995 in the case of Stratton Oakmont, Inc. v. Prodigy Services Co. 45 There, an investment firm, allegedly defamed on an Internet bulletin board, sued that board’s owner, Prodigy. The New York trial court held that Prodigy could be liable as a publisher because it had advertised

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its editorial control over the site.\textsuperscript{46} Even in this decision, marking a high point of liability concerns, the court was mindful of the impact on new Internet enterprises, which might follow the decision’s logic and simply disavow any editorial control and thereby avoid any liability. The court argued that “the market will . . . compensate a network for its increased control and the resulting increased exposure.”\textsuperscript{47} There is economic logic to this, but it may be that the costs of monitoring are so high as to create a service that is too expensive to attract sufficient buyers. While it might be relatively cheap to monitor for pornography or indecent words, it is far more difficult to evaluate factual claims made in the thousands of posts on a particular site. More importantly, the court’s vision of the metered website is quite different than the cyberspace that actually flourished after \textit{Stratton Oakmont} was undone by statute the following year.

Despite the trial court’s assurances of market compensation to come, the industry was understandably alarmed at the ruling. It turned to Congress to fashion a remedy. In a short section embedded within the Communications Decency Act, Congress undid \textit{Stratton Oakmont}. Under the subsection heading “Protection for ‘Good Samaritan’ blocking and screening of offensive material” (no Good Samaritan behavior was actually required for the main § 230 immunity to attach), Congress declared that online service providers could never be treated as publishers for material they did not develop.\textsuperscript{48} As interpreted by courts, the section largely immunized online service providers from secondary liability for most torts committed through their service.\textsuperscript{49} The section offered online publishers an immunity that their offline compatriots never enjoyed. One student commentator compares the treatment of \textit{Soldier of Fortune} magazine, held liable in 1992 for millions of dollars in damages for permitting an advertisement that led, tragically, to an actual murder-for-hire, to an online newspaper that would avoid similar liability because of § 230.\textsuperscript{50}

\textsuperscript{46} Id. at *5. The plaintiffs initially claimed an astonishing $200 million in damages. Peter H. Lewis, \textit{After Apology from Prodigy, Firm Drops Suit}, N.Y. TIMES, Oct. 25, 1995, at D1 (noting that the firm ultimately agreed to drop its $200 million libel lawsuit against Prodigy in return for Prodigy saying sorry).

\textsuperscript{47} \textit{Stratton Oakmont}, 1995 WL 323710, at *5.


\textsuperscript{49} One need only consider an alternative suggestion by Missouri Congresswoman Danner to sense the array of paths not taken: “Mr. Chairman, . . . . [t]elephone companies must inform us as to whom our long distance calls are made. I believe that if computer online services were to include itemized billing, it would be a practical solution which would inform parents as to what materials their children are accessing on the Internet.” 141 CONG. REC. 22,046 (1995) (emphasis added) (statement of Rep. Pat Danner).

Congress justified this differential treatment on the ground that “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”51 Furthermore, Congress sought “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”52 Congress thus sought to simultaneously promote the speech potential of a largely self-regulated Internet, while fostering the rise of Internet enterprises.53 Indeed, though largely unheralded at the time, the section proved a lifeline to Web 2.0 enterprises.

For their part, courts read the mandate in § 230 broadly, defining “interactive computer service” broadly, and as covering a large array of claims, both state and federal (but excluding intellectual property claims, as per the statute’s directions). Most importantly, they not only eliminated a website’s liability as a publisher, but also as a distributor. Where publishers typically faced strict liability, distributors such as a library or bookstore would be liable if they had knowledge of the wrongdoing and still refused to act.54 In Zeran v. America Online, Inc., the Fourth Circuit held that § 230 must be read to eliminate distributor liability, as well as publisher liability, for web services.55 The court reasoned that a contrary holding would chill speech because it would create a natural incentive for service providers to take down information that some user found offensive for fear of liability for letting it remain: “Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not.”56 Other circuits followed Zeran’s broad reading, eliminating distributor liability as an incident of the defense against publisher liability.57

51 47 U.S.C § 230(a)(3).
52 Id. § 230(b)(2).
53 See id. § 230(a).
55 129 F.3d 327, 332–33 (4th Cir. 1997).
56 Id. at 333.
Again and again, § 230 proved invaluable to shield web enterprises from lawsuits, as demonstrated by a plethora of cases.58 Perhaps every major

Internet enterprise has relied on the statute to defend itself over the years. The CDA insulated web enterprises from the reach of a variety of federal and state causes of action, both statutory and common law. These include, for example, the Federal Fair Housing Act, Title II of the Civil Rights Act of 1964, the Washington State Consumer Protection Act, and common law actions such as invasion of privacy, negligence, and tortious interference with business relations. The CDA’s § 230 was no panacea—it failed as a defense a third of the time; it still required the Internet enterprise to engage in expensive litigation; and, even when it proved a successful defense, a year had often passed in the interim.

that Defendant, an Internet service provider, is immune under the CDA and, therefore, is not responsible for the anti-Islamic comments submitted onto its online chat rooms by users), aff’d, No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004); PatentWizard, Inc. v. Kinko’s, Inc., 163 F. Supp. 2d 1069 (D.S.D. 2001) (relying on § 230 to immunize a provider of Internet service in a case arising out of a patron’s use of Defendant’s service in an alleged defamation); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998) (relying on § 230 to immunize AOL against defamation claims arising out of statements by a gossip columnist, even though AOL had contracted with the gossip columnist to provide content); Stoner v. eBay Inc., No. 305666, 2000 WL 1705637 (Cal. Super. Ct. 2000) (relying on § 230 to immunize eBay from claims related to the sale of bootleg and other infringing sound records posted by users); Giordano v. Romeo, 76 So. 3d 1100 (Fla. Dist. Ct. App. 2011) (relying on § 230 to immunize a website operator for alleged defamation by third parties); Delle v. Worcester Telegram & Gazette Corp., No. 11-0810, 2011 Mass. Super. LEXIS 295 (Mass. Super. Ct. 2011) (relying on § 230 to immunize an online news website for comments posted by users); Shiamili v. Real Estate Gpr., of N.Y., Inc., 952 N.E.2d 1011 (N.Y. 2011) (relying on § 230 to immunize a website operator for allegedly defamatory statements even though Defendants reposted these statements and added headings to the comments); UMG Recordings, Inc. v. Escape Media Grp., Inc., 948 N.Y.S.2d 881 (Sup. Ct. 2012) (relying on § 230 to immunize an operator of a website against copyright infringement on the operator’s website), rev’d on other grounds, 964 N.Y.S.2d 106 (App. Div. 2013); Hill v. StubHub, Inc., 727 S.E.2d 550 (N.C. Ct. App. 2012) (relying on § 230 to immunize an online marketplace against the sale of tickets on the marketplace in violation of state law regulating ticket pricing), review denied, 736 S.E.2d 757 (N.C. 2013). But see CYBERsitter, LLC v. Google Inc., 905 F. Supp. 2d 1080 (C.D. Cal. 2012) (denying Google’s motion to dismiss because § 230 immunity is dependent on whether Google materially contributed to the damaging information on its website and it was too early to make such a determination); Amerigas Propane, L.P. v. Op. Corp., No. 12-713, 2012 WL 2327788 (E.D. Pa. June 19, 2012) (denying a website operator’s motion to dismiss under § 230 because Plaintiff alleged that the website operator was the creator of some of the posts that infringed Plaintiff’s trademark); Chang v. Wozo LLC, No. 11-10245-DJC, 2012 WL 1067643 (D. Mass. Mar. 28, 2012) (denying Internet advertising companies’ motions to dismiss under § 230 because Plaintiff alleged that the Internet advertising companies, at least in part, created the fraudulent Internet advertisements); Lansing v. Sw. Airlines Co., 980 N.E.2d 630 (Ill. App. Ct. 2012) (holding that § 230 does not grant immunity against a claim of negligent supervision when an employee uses Southwest’s computer and Internet to send harassing and threatening e-mails because whether Defendant is treated as a publisher or not is irrelevant to Plaintiff’s pleaded claim).


Two foundational cases demonstrate the practical value of the CDA to web enterprises. In *Doe v. MySpace, Inc.*, the social networking site faced a claim for liability arising from a heinous act—an assault on a minor by a nineteen-year-old man whom she met through MySpace.61 The family sued MySpace for negligence in not verifying her age on the ground that verification would have revealed that she was thirteen when she registered, not eighteen as she claimed.62 The Fifth Circuit Court of Appeals ruled that § 230 protected MySpace from the suit.63 The CDA also protected an Internet dating service from a lawsuit arising from a malicious posting of a false profile on a dating site.64 Someone using a computer in Berlin posted a profile using photos of the actress Christianne Carafano suggesting that she was interested in meeting men, and made her home address and phone number available.65 In *Carafano v. Metrosplash.com, Inc.*, the Ninth Circuit Court of Appeals relied on § 230 to deny Carafano’s lawsuit against the owner of the dating site for invasion of privacy, misappropriation of the right of publicity, defamation, and negligence.66 The court ruled that “despite the serious and utterly deplorable consequences that occurred in this case, we conclude that Congress intended that service providers such as Matchmaker be afforded immunity from suit.”67 The court recognized that as a result of the law, “Internet publishers are treated differently from corresponding publishers in print, television and radio.”68

With CDA § 230, both commercial and speech considerations coincided. As the Fourth Circuit noted in *Zeran*, a notice and takedown system would inevitably lead to firms generally choosing to take down controversial statements, rather than face any specter of liability.69 As Neal Katyal writes: “Because an ISP [Internet Service Provider] derives little utility from providing access to a risky subscriber, a legal regime that places liability on an

61 528 F.3d 413, 416 (5th Cir. 2008).
62 Id. at 420–21.
63 Id. at 422.
64 Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1121, 1125 (9th Cir. 2003).
65 Id. at 1121.
66 Id. at 1122, 1125.
67 Id. at 1125.
68 Id. at 1122.
ISP for the acts of its subscribers will quickly lead the ISP to purge risky ones from its system.70

Even while § 230 offered a lifeline to Internet enterprises, the remainder of the CDA complicated their work tremendously. Core provisions of the CDA sought to make it difficult for children to access material judged indecent by a community. But in Reno v. ACLU, the Supreme Court stepped in to strike down those provisions as a violation of the freedom of speech.71 The CDA’s anti-indecency provisions posed a particular challenge to sites that welcomed user content. Unless these sites verified the ages of their users, typically through credit cards, they faced the very real possibility that someone would post indecent material on their pages. The statute covered all “communications,” not just images, and thus required a website administrator to actually read through the postings of users to adjudicate decency.72 In a very real sense then, Reno v. ACLU made possible Web 2.0.

The interaction between Congress and the Court expressed through the CDA § 230/Reno v. ACLU pairing consisted in a legislature that immunized Internet enterprises from the actions of others, and a court that declared that Internet enterprises could not be made to act as censors for the state, at least under certain terms. Neither Congress nor the Courts were consistently single-minded in their promotion of Internet enterprise, yet their interaction resulted in precisely this. Congress overruled any court that might have sought to hold intermediaries liable for user-generated content (other than for intellectual property-based claims, an area we turn to next). Meanwhile the Courts overturned congressional efforts to require Internet enterprises to censor speech widely. The end result was a legal framework conducive to promoting speech on the Internet through online speech intermediaries.

B. Copyright

Any technology that allows individuals to share information can lend itself to copyright infringement. A company like Yahoo that allows individuals to post whatever they want online faces a high risk that its service will be used for

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70 Neal Kumar Katyal, Criminal Law in Cyberspace, 149 U. Pa. L. Rev. 1003, 1007–08 (2001). Law and economics scholars have argued that the problem was that users were unwilling to pay ISPs for the full social benefit because of positive externalities from their use, and this resulted in a market failure. See, e.g., Doug Lichtman & Eric Posner, Holding Internet Service Providers Accountable, 14 SUP. CT. ECON. REV. 221, 225–26 (2006).


extensive copyright infringement. The company might be liable for direct infringement every time it delivers a copy of the copyrighted work (direct infringement being a strict liability offense), for contributory infringement if it has knowledge and makes a material contribution to the infringement, and for vicarious infringement if it controls and earns a direct financial benefit from the infringement. Given that statutory damages for direct infringement alone range from $200 to $150,000 for each work,73 and that millions of works are copied online, the specter of liability would be enough to stop most Internet companies dead in their tracks. This is not a hypothetical concern. Consider the graveyard of dot-com enterprises, felled not by flawed monetization plans, but by copyright law: MP3.com, ICraveTV.com, Aimster, Grokster, and, most famously, Napster.74

While § 230 of the CDA protected websites against a wide variety of claims arising out of the actions of their users, it explicitly excluded intellectual property claims from its ambit.75 This meant that any site that collected material provided by users might still be held liable for claims arising out of copyright or trademark. Internet enterprises remembered well the 1993 case of Playboy Enterprises, Inc. v. Frena, in which a court held the operator of an online bulletin board strictly liable for copyright infringement by users of that board.76 The declaration by a federal court that “[i]t does not matter that Defendant Frena may have been unaware of the copyright infringement”77 must have rattled many in Silicon Valley.78

73 17 U.S.C. § 504(c)(1)–(2) (2012) (providing statutory damages per work of $750 to $30,000, but permitting damages per work to be reduced to $200 in cases where the defendant was not aware, and had no reason to believe, that infringement was occurring, or increased to $150,000 in cases of willful infringement). For a cogent critique, see Pamela Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform, 51 WM. & MARY L. REV. 439 (2009).
77 Id.
78 Another federal district court refused to uphold a direct copyright infringement claim, though that court was more willing to entertain a claim of secondary infringement. Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc., 907 F. Supp. 1361, 1372 (N.D. Cal. 1995) (“[I]t does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet…. The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred.”).
The Internet industry set out to reform the law, but the content industries resisted, as did the White House initially. In 1995, a White House task force led by Patent Commissioner Bruce Lehman concluded that it was “premature” to reduce legal risks for Internet intermediaries, preferring to treat them as publishers for copyright purposes.79 Traditional publishers, of course, are strictly liable for copyright infringement in their publications, and thus this approach would have subjected Google and Facebook to strict liability for their users’ actions.80 Given the volume of material they carry, it is hard to imagine how we might have Google or Facebook today if they were to have the publisher liability of The New York Times or Time Warner. CompuServe’s general counsel Stephen Heaton testified before Congress that strict liability for online service providers shifted enforcement responsibility from copyright owners to the online enterprises.81 Requiring such enterprises to monitor the “trillions of bits of data” that crossed their computer networks would “bring[] their businesses to a halt, almost immediately,” he averred.82 The recording industry denied the need for special protections for online service providers, making plain the industry’s aversion to such special rules for online companies:

Internet Access Providers . . . . argue that copyright liability will stifle the growth of the Internet, chill investment in companies that provide Internet access, and unfairly harm their companies when they have no control over or knowledge of what users may be doing on their network.

Frankly, we don’t see it.83

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80 See, e.g., Playboy, 839 F. Supp. at 1559 (applying traditional copyright publisher liability to online bulletin board service).


82 Id.

83 The Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1146 Before the S. Comm. on the Judiciary, 105th Cong. 15 (1997) (statement of Cary H. Sherman, Senior Executive Vice President and General Counsel, Recording Industry Association of America).
Public interest groups, including library associations and consumer groups, argued against expanded rights of the copyright industry online. Consumer electronics firms, too, worried about expanded copyright liabilities, but the copyright industries responded that this was merely an effort by Japanese manufacturers to profit from American material.

By late 1998, the copyright and information industries came to a mutual understanding, reflected in a complicated set of safe harbors under which Internet companies could seek shelter from copyright liability. With the Digital Millennium Copyright Act, Congress sought to address the impact of the digital environment on copyrighted works by (a) barring devices that circumvented copyright protection schemes (Title I, the “WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998”); and (b) offering companies that followed certain policies respectful of copyright immunity from claims for copyright infringement (Title II, the “Online Copyright Infringement Liability Limitation Act” or OCILLA). While the DMCA was best known for its first Title, which made it illegal to circumvent copyright protection schemes like those found in DVD movies, the second Title of the statute provided safe harbors for Internet enterprises from copyright liability.

OCILLA provided four safe harbors for commercial enterprises: the first for the companies that bring the Internet to one’s home, the second for the companies that make temporary copies of data being routed on the Internet, the third for companies that host on the Internet material provided by others, and the fourth for Internet search engines. The last two safe harbors in particular proved crucial to Silicon Valley enterprises. As Edward Lee writes, “virtually
all commercial websites in the U.S. that deal with third-party content attempt to follow and fall within the safe harbors. Indeed, it would be foolish, if not a breach of corporate fiduciary duty, for any such company not to do so.”

OCILLA achieved a modus vivendi between northern and southern California—where Silicon Valley would banish repeat offenders and take down material if requested by the copyright owner, often based in Hollywood. By performing these duties diligently, Silicon Valley enterprises generally managed to avoid liability for the widespread copyright infringement that still occurred through their systems. While some have legitimately criticized OCILLA for leading firms to take down material too quickly for fear of jeopardizing their safe harbor, OCILLA marked a significant

against Defendant for providing services for websites that infringed Plaintiff’s copyrights); Viacom Int’l Inc. v. YouTube, Inc., No. 07 Civ. 2103(ILL), 2013 WL 1689071 (S.D.N.Y. Apr. 18, 2013) (relying on 17 U.S.C. § 512(c) to immunize YouTube from liability for copyrighted materials on the website that were uploaded by third-party users, despite the fact that YouTube may have known that infringement was ubiquitous throughout the website); Wolk v. Kodak Imaging Network, Inc., 840 F. Supp. 2d 724 (S.D.N.Y. 2012) (relying on 17 U.S.C. § 512(c) to immunize Photobucket from Plaintiff’s claims that Photobucket users have copied, displayed, and modified Plaintiff’s copyrighted material); Brown v. Way, No. 10-cv-13016, 2011 WL 3555618 (E.D. Mich. Aug. 5, 2011) (finding that 17 U.S.C. § 512 immunizes Defendant’s online message boards from liability for its users’ postings of allegedly copyrighted content); Io Grp., Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132 (N.D. Cal. 2008) (relying on 17 U.S.C. § 512(c) to immunize Veoh from liability for copyrighted videos posted on its site by third parties, even though Veoh’s website may have facilitated users in accessing copyrighted materials); Parker v. Google, Inc., 422 F. Supp. 2d 492 (E.D. Pa. 2006) (relying on 17 U.S.C. § 512(b) to immunize Google from copyright claims against Google’s automatic website caching and indexing activities); Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082 (C.D. Cal. 2001) (relying on 17 U.S.C. § 512 to immunize eBay from liability for the third-party sale of pirated materials on eBay’s website).

But see Ellison v. Robertson, 357 F.3d 1072 (9th Cir. 2004) (denying AOL’s summary judgment motion because AOL may not satisfy the safe harbor requirements in 17 U.S.C. § 512(i) because it failed to have a working e-mail address for infringement notifications); Columbia Pictures Indus. v. Fung, No. CV 06-5578 SVW(JCx), 2009 WL 6355911 (C.D. Cal. Dec. 21, 2009) (denying defendants safe harbor protection because they were aware of their users’ ongoing infringing activities, aff’d in part as modified, 710 F.3d 1020 (9th Cir. 2013); Capitol Records, Inc. v. MP3tunes, LLC, No. 07 Civ. 9931(WHP), 2009 WL 3364036 (S.D.N.Y. Oct. 16, 2009) (denying an online music storage website’s motion to dismiss against Plaintiff’s copyright infringement claims because the website did not meet the safe harbor threshold requirements stipulated in 17 U.S.C. § 512(i); Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124 (S.D.N.Y. 2009) (denying an online bulletin board safe harbor protection because it knowingly failed to take action to prevent infringing material).

92 Lee, supra note 89, at 234.

93 Jerome H. Reichman et al., A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works, 22 BERKELEY TECH. L.J. 981, 983 (2007) (“When enacting the Digital Millennium Copyright Act (DMCA) of 1998 as the U.S. implementation of the WCT, Congress achieved a reasonable balance of competing interests in its creation of safe harbors from copyright liability for internet service providers (ISPs) and other intermediaries for the infringing acts of others.” (footnote omitted)).

accomplishment for Silicon Valley in creating rules that allowed Web 2.0 enterprises to flourish without either excessive copyright management costs or high liability risks.\footnote{But see Pamela Samuelson, Intellectual Property and the Digital Economy: Why the Anti-circumvention Regulations Need to Be Revisited, 14 BERKELEY TECH. L.J. 519, 522–24 (1999) (arguing that the DMCA was broader than necessary in relation to WIPO, and that the Act’s anti-circumvention provisions “do not match up well with the needs of the digital economy”).}

In recent years, especially in the battle against SOPA, it has become apparent that the content industry is dissatisfied with the détente struck in 1998. The extent of the content industry’s distaste for Silicon Valley is evident in—of all things—Rupert Murdoch’s tweets. In January 2012, Murdoch used Twitter to accuse Google of being a “[p]iracy leader.”\footnote{Murdoch said, “Piracy leader is Google who streams movies free, sells [advertisements] around them.” David Carr, A Glimpse of Murdoch Unbound, N.Y. TIMES, Jan. 30, 2012, at B1 (internal quotation mark omitted).}

Courts, too, played a central role in the flourishing of Silicon Valley enterprise in the face of claims of copyright holders. Major advances in information technology had put pressure on copyright holders before, and courts had been called upon to adjudicate disputes between the two industries. In the 1980s, courts had largely sheltered the electronics industry against copyright infringement claims. When Sony introduced a video-cassette recorder, Hollywood studios sued because the device could copy television shows. The Supreme Court in 1984 in \textit{Sony Corp. of America v. Universal City Studios, Inc.} protected the new technology, arguing that the device had “substantial noninfringing uses.”\footnote{464 U.S. 417, 442 (1984).} As Pamela Samuelson writes, had it not been for the relief from liability offered by the \textit{Sony} decision, “tape recorders, photocopiers, CD burners, CD ripping software, iPods, and MP3 players, and a host of other technologies that facilitate private or personal use copying might have never become widely available.”\footnote{Pamela Samuelson, The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens, 74 FORDHAM L. REV. 1831, 1830 (2006); see also Mark A. Lemley & R. Anthony Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 STAN. L. REV. 1345, 1356 (2004) (arguing that the \textit{Sony} rationale offered “significant protection for innovation in technologies that are related to the use of copyrighted material”).} The decision did not insulate every new technology. Peter Menell and David Nimmer observe that, in the years since the \textit{Sony} decision, “the developers and distributors of Napster, Aimster, Grokster, Morpheus, and KaZaA—peer-to-peer systems that have
noninfringing uses—have all been held liable for contributory infringement, *Sony* notwithstanding.99

Yet, the Supreme Court’s own intervention in the digital copyright, in the case of *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,100 yielded a result that was largely friendly to Silicon Valley innovation. The movie studios and others had invited the Court to erode the *Sony* rule by requiring that it be the principal actual use of a device or service, not its potential use, that should determine its legality.101 In arguing their cause before the Court, the copyright industries understood that they must not be seen as standing in the way of innovation. The songwriter plaintiffs devoted one of the three parts of their main brief to the proposition that “[h]olding Grokster and Streamcast liable will encourage, not restrain, legitimate commerce.”102 The motion picture studios and recording companies argued that a holding in favor of the file-sharing services would threaten “artistic innovation” as well as “obstruct[[] innovators seeking to use digital technology for lawful distribution of copyrighted works.”103 For their part, the file-sharing services pressed the potential chill on innovation with even greater zeal. The word “innovation” appears no less than forty-five times in their brief. The file-sharing services argued:

Modifying the *Sony* rule as petitioners suggest would . . . deter investment in innovation by subjecting innovators to standards that are unpredictable in application and expensive to litigate, and put large sectors of the digital-technology economy in the hands of entertainment-industry incumbents with a vested interest in preserving their existing business arrangements, to the detriment of both creators and consumers.104

Justice David Souter, writing for the Court, observed that the rule in *Sony* “leaves breathing room for innovation and a vigorous commerce.”105

The Supreme Court’s decision marked the death knell for two Internet services, Grokster and Streamcast, which could be found liable for “inducing”

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100 545 U.S. 913 (2005).
101 See Reply Brief for Motion Picture Studio & Recording Co. Petitioners at 1–6, *Grokster*, 545 U.S. 913 (No. 04-480).
102 Brief for Songwriter & Music Publisher Petitioners at 17, *Grokster*, 545 U.S. 913 (No. 04-480).
103 Reply Brief for Motion Picture Studio & Recording Co. Petitioners, *supra* note 101, at 11–12.
105 *Grokster*, 545 U.S. at 933.
The American concept of "fair use" also proved conducive to various innovations in the digital realm. Fair use allowed a court to provide exceptions to copyright after considering multiple factors. Take the example of image search, introduced by Google in 2001. Google’s computers now supplied images that matched search terms. This required Google to show smaller, "thumbnail" versions of those images. When Google was challenged, the Ninth Circuit ruled that these thumbnail versions of the images constituted fair use.109

C. Privacy

U.S. privacy law offers limited constraints for American Internet entrepreneurs. The vaunted common law privacy torts are each quite narrow in scope and mostly unavailing to web users concerned about protecting personal information.110 The torts are not well-suited to the typical privacy concern with

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106 Id. at 941.
109 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007).
110 James Whitman concludes that “after a century of legal history, [the right-to-privacy tort] amounts to little in American practice today.” Whitman, supra note 21, at 1204; see also Neil M. Richards, The Limits of Tort Privacy, 9 J. ON TELECOMM. & HIGH TECH. L. 357 (2011) (arguing that tort privacy is poorly suited to the digital age); Paul M. Schwartz, Privacy and Democracy in Cyberspace, 32 VAND. L. REV. 1609, 1634 (1999) (“Unfortunately, various limitations that the common law has established on [the privacy torts] eliminate their usefulness in responding to violations of privacy in cyberspace. As a result of these restrictions, most data processing on the Internet is excluded from the scope of the four branches of the privacy tort.” (footnote omitted)). Consider each of Prosser’s famous torts in turn. The tort of intrusion upon seclusion requires that the tortfeasor intentionally invade the solitude of another in his or her private affairs, such as through secret
respect to social media, doing little to bar the use of personal information for marketing or the onward sharing of personal information in unexpected ways.\textsuperscript{111} Statutory protections remain quite narrow.\textsuperscript{112}

With the dawn of the World Wide Web, the Clinton Administration convened a task force to think through privacy rules for these new communications services. The task force’s 1995 white paper began by observing that “many people may be reluctant to use the NII [National Information Infrastructure] if they are afraid that the personal information transmitted over it can be used in ways that are unexpected or inappropriate.”\textsuperscript{113} But instead of a new omnibus privacy statute, the task force

\textsuperscript{111} William McGeveran, Disclosure, Endorsement, and Identity in Social Marketing, 2009 U. Ill. L. Rev. 1105, 1135–36 ("The most significant problem with these limits on disclosure derives from their circumscribed scope. . . . Against this general background, social marketing appears unlikely to violate most U.S. privacy laws.").


proposed a voluntary framework whereby companies would notify users of how they intended to collect and use information, and seek the consent of the users for such collection and use.\footnote{Id. (“If such private sector action is not forthcoming, however, that framework can and should form the basis for government-mandated privacy regulations or standards.”).} That model, of course, became the operative one, allowing websites to set the terms for user privacy, subject only to public acceptance of those terms rather than regulatory constraints.

Congress did in fact act to protect children’s privacy through the Children’s Online Privacy Protection Act of 1998 (COPPA). COPPA established significant protections for younger children online, including requiring parental consent before websites could collect information from children under thirteen and requiring adequate security measures for information that was collected.\footnote{15 U.S.C. § 6502(b)(1)(A)(ii) (2012) (requiring website operators “to obtain verifiable parental consent for the collection, use, or disclosure of personal information from children”); id. § 6502(b)(1)(D) (providing for the promulgation of regulations that “require the operator of such a website or online service to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children”).} This might have posed a challenge to web providers, which would have had to either segregate how they handled children’s information or refuse children access. Yet, the statute proved easy to avoid by e-commerce providers, who simply officially banned those under thirteen from their sites. Millions of American children responded by fabricating a false birth year to enable them to access sites such as Facebook—\footnote{Consumer Reports estimates that nearly 7.5 million children under the age of thirteen use Facebook by lying about their age. Online Exposure, CONSUMER REP., June 2011, at 29, 30.}—an expedient available to youth with a modicum of mathematical ability.\footnote{Tony Bradley, Kids Under 13 Are Already Allowed on Facebook, PCWORLD (May 21, 2011, 6:48 AM), http://www.pcmag.com/article228348/kids_under_13_are_already_allowed_on_facebook.html; Matt Richtel & Miguel Helft, Where Age Is What You Say It Is, N.Y. TIMES, Mar. 12, 2011, at B1.} As long as the sites did not have actual knowledge that the child was under thirteen, they had no statutory obligation to treat his or her information with care.\footnote{Under the actual knowledge standard, “operators of general audience Web sites are not required to investigate the ages of their users.” Children’s Online Privacy Protection Rule, 76 Fed. Reg. 59,804, 59,806 (Sept. 27, 2011) (to be codified at 16 CFR pt. 312).}

During the last decade, the absence of strong privacy regulations proved particularly important because of the business model used by many consumer-oriented websites. Web 2.0 providers earn money through advertising or through selling additional services. If the online provider can tailor advertisements precisely to the interests of the user, then the advertising will be
more lucrative.119 In other words, the more the online provider knows about you, the more it can earn. Rules protecting user privacy can, accordingly, interfere with a company’s ability to gather information about you, or to develop a better profile of you by collating information with other online providers. Thus, the absence of a broad array of effective privacy-enhancing restraints leaves online services largely free to exploit user information for maximum profit. As long as the services do not promise more privacy than they actually deliver, online companies in the United States have a free hand with information.

The absence of privacy constraints proved especially conducive to Internet innovation. The success of Silicon Valley enterprises has often been a result not just of a single initial inspiration, but of successive rounds of serial innovation within a single firm.120 Much of this innovation results from rapid experimentation—roll-out of new products, beta-testing, and appraisal. Many Web 2.0 businesses rely upon a trial-and-error model for innovation. Beta offerings are presented to be retracted, modified, enhanced, or finalized depending on the market reception. The plasticity of the software allows quick responses to market conditions. Because the businesses are innovating new relationships between users and information, the risk to privacy in this process of experimentation is especially high. A liberal privacy regime thus proves conducive to this kind of trial-and-error method for innovation, allowing companies to base their offerings not on legal constraints but on market reaction.

119 Robert D. Hof, You Are the Ad, TECH. REV., May/June 2011, at 64, 66 (“[O]ne reason advertisers love Facebook is that ads can be precisely targeted to specific audiences on the basis of their stated interests, location, ‘likes,’ and much more.”); Charles Duhigg, Pst, You in Aisle 5, N.Y. TIMES MAG., Feb. 19, 2012, at 30 (“Almost every major retailer, from grocery chains to investment banks to the U.S. Postal Service, has a ‘predictive analytics’ department devoted to understanding not just consumers’ shopping habits but also their personal habits, so as to more efficiently market to them.”); Saul Hansell, Microsoft Plans to Sell Search Ads of Its Own, N.Y. TIMES, Sept. 26, 2005, at C1; Michael Zimmer, The Externalities of Search 2.0: The Emerging Privacy Threats When the Drive for the Perfect Search Engine Meets Web 2.0, 13 FIRST MONDAY (2008), http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/rt/printerFriendly/2136/1944 (“[S]earch engines can charge higher advertising rates when ads are accurately placed before the eyes of users with relevant needs and interests . . . .”).

120 Google, which occupies the campus of Silicon Graphics, a company that once was a flagship Silicon Valley enterprise, erected an enormous dinosaur statue on that campus to serve as a reminder of the need to innovate constantly. Dean Takahashi, Google: Where Food Is Free, IQs Are High, SAN JOSE MERCURY NEWS, July 19, 2007; see also The Internet: How Long Will Google’s Magic Last?, ECONOMIST, Dec. 4, 2010, at 81 (quoting Google’s head of product management Jonathan Rosenberg as stating, “[Y]ou only win if you innovate faster than the players in the rest of the system.” (internal quotation mark omitted)).
The end result is as follows: while Facebook’s and Google’s innovations have often drawn public outcries, they seldom draw successful lawsuits or government enforcement actions.

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By the end of the twentieth century, laws conducive to the business model of Web 2.0 were in place. Companies would offer platforms on which users could provide content, which would in turn attract other users. Companies would then monetize these large numbers of users by exploiting personal information about them for marketing. And the law would abide this.

I have shown that, just as nineteenth-century American judges altered the common law in order to subsidize industrial development, judges and

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121 See, e.g., Economist Intelligence Unit, “Act Now, Apologize Later”: Will Users “Friend” Facebook’s Latest Intrusion on Privacy?, EXEC. BRIEFING, June 18, 2010, at 7 (consumer advocates complained that Facebook’s new “Open Graph” architecture which connects third-party websites to the Facebook Platform so that users can “like” or recommend content, invades user privacy); Miguel Helft, Google Photos Stir a Debate Over Privacy, N.Y. TIMES, June 1, 2007, at C1 (consumer advocates complained that Google’s new feature on Google Maps, which shows pictures of street-level views of addresses, invades user privacy); Jon Swartz, Privacy Advocates Don’t ‘Like’ Facebook’s Ad Plans, USA TODAY, Jan. 31, 2011, at B1 (consumer advocates complained that Facebook’s new feature called “Sponsored Stories,” which allows advertisers to pay for users to be able to “like” their brand or check in at a store and have that action appear on the user’s friends’ pages, invades user privacy); Jamin Warren & Vauhini Vara, New Facebook Features Have Members in an Uproar, WALL ST. J., Sept. 7, 2006, at B1 (consumer advocates complained that Facebook’s new feature called “News Feed,” which keeps track of users’ actions and then notifies all of their friends of those developments, invades user privacy); Jenna Wortham, Facebook Flagged on Privacy Issue, N.Y. TIMES, Aug. 23, 2010, at B4 (consumer advocates complained that Facebook’s new feature called “Facebook Places,” which allows users to share their location and find their friends’ locations, invades user privacy); Michael Arrington, Google Desktop 3.0: Privacy Is Dead(er), TECHCRUNCH (Feb. 8, 2006), http://techcrunch.com/2006/02/08/google-desktop-new-version-tonight/ (consumer advocates complained that Google’s new search feature, which allows users to search the contents of one computer from another, invades user privacy); Thomas Claburn, Privacy Groups Decry Google’s Plans for DoubleClick, INFO. WEEK (Apr. 20, 2007, 3:57 PM), http://www.informationweek.com/news/199200331 (consumer advocates complained that Google’s new feature called “Web History,” which allows Google to create a complete picture of its users’ online activity by combining data about Google searches, webpage visits, images, videos, and news stories, invades user privacy); Facebook Facial Recognition Raises Eyebrows in Germany, EU, DEUTSCHE WELLE (June 9, 2011), http://dw.de/p/11Xg8 (consumer advocates complained that Facebook’s new feature using facial recognition technology to identify persons in newly added photos, invades user privacy); Facebook Opens Users Shopping Habits, UPI (Nov. 24, 2007, 6:46 PM), http://www.upi.com/Business_News/2007/11/24/Facebook-opens-users-shopping-habits/UPI-6161195948019/ (consumer advocates complained that Facebook’s new feature, which makes users’ online shopping habits public, invades user privacy).

legislators at the turn of the Millennium altered the law to subsidize the development of Internet companies. Did technologically advanced nations in Europe and Asia do the same?

II. CONSTRAINTS IN EUROPE AND ASIA

Could Google have been founded in London? According to Google’s Larry Page and Sergey Brin, as related by Prime Minister David Cameron, the answer is no.\(^\text{123}\) This is not due to the lack of brilliant engineers in the United Kingdom, or sufficient capital in the City of London. Prime Minister Cameron explains that the Google founders told his government that Google’s service “depends on taking a snapshot of all the content on the internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States.”\(^\text{124}\) Unlike the law in the United Kingdom, where Google’s search engine activities might cross the line of copyright infringement without any promising legal lifeline, U.S. law seems more flexible. Prime Minister Cameron explained, with apparent envy: “Over there, they have what are called ‘fair-use’ provisions, which some people believe gives companies breathing space to create new products and services.”\(^\text{125}\)

But did not Europe offer inducements through the law to web enterprises similar to those in the United States? And what of Japan and South Korea, Asian nations that were at the forefront of creating information societies?\(^\text{126}\)


\(^\text{124}\) UK Copyright Laws to Be Reviewed, Announces Cameron, supra note 123.

\(^\text{125}\) Id. (internal quotation mark omitted). This is not idle speculation offered in retrospect. Google’s Larry Page reports that even in the relatively liberal United States, “at the time, people were arguing that making a copy of a file in a computer’s memory was a violation of copyright. We put the whole web on our servers, so if that were true, bye-bye search engines.” \(\text{Levy, supra note 13.}\)

\(^\text{126}\) See Brian Deutsch, Editorial, See the Digital Future: Korea Today, PITTSBURGH POST-GAZETTE, Mar. 28, 2010, at B7 (detailing South Korea’s information-based society); \(\text{Mark McDonald, For South Korea, Internet at Blazing Speeds Is Still Not Fast Enough, N.Y. TIMES, Feb. 22, 2011, at B3 (noting that South Korea plans to upgrade its already fast Internet services to provide one gigabit per second Internet speeds to every home in the country); Jon Brodkin, Two-Thirds of U.S. Internet Users Lack Fast Broadband, NETWORK WORLD (Jan. 24, 2011, 3:29 PM), http://www.networkworld.com/news/2011/012411-us-internet-users-broadband.html (noting that in the United States only 34% of users have Internet connections greater than 5 Mbps, while in Korea and Japan over 60% of Internet connections are greater than 5 Mbps); Internet}
will show that indeed these nations took steps to adjust their laws to the new cyber-environment, but without the same depth of preference for web enterprises. Where the United States sought to insulate Internet intermediaries from liability for the misdeeds of their users, Europe, Japan, and South Korea created special responsibilities for Internet services. Indeed, what might be celebrated in the United States could be illegal in Europe, Japan, and South Korea. Facebook finds the distinction between U.S. law of intermediary liability and the law elsewhere to be material to its investors. Facebook states that the risk that it will face claims “is enhanced in certain jurisdictions outside the United States where our protection from liability for third-party actions may be unclear and where we may be less protected under local laws than we are in the United States.”

Comparative law scholars may observe that many jurisdictions lack the statutory or punitive damages available under U.S. law, making more legally demanding obligations abroad less harsh in reality in comparison to the plaintiff-friendly United States. But when it comes to Internet intermediaries, a simple injunction alone could require a restructuring of the system that made the platform economically unfeasible. Only the most foolhardy financiers would invest in an early stage enterprise that had a business that a tribunal might declare illegal at any moment. The programmer might even be sent to jail.

In the sections below, I examine the laws of the European Union, South Korea, and Japan, demonstrating that when it comes to intermediary liability, copyright liability, and privacy, the laws of these regions are far less conducive to Internet enterprise than the United States.

A. Intermediary Liability

1. European Union

The European Union’s intermediary liability law proved less welcoming to Internet entrepreneurs than U.S. law. Europe takes a unified approach to the

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127 Facebook, Inc., Registration Statement (Form S-1) 23 (Feb. 1, 2012).
issue of intermediary liability, setting the same standard for holding intermediaries liable regardless of the nature of the underlying offense. There is logic to this approach, even if it is unlike the American approach, which, as we have seen in Part I.A above, offers different rules for intermediary liability for copyright, trademark, and other offenses. The European Union’s Electronic Commerce Directive sets out what are essentially safe harbors from liability for specified intermediary activities, such as acting as a “mere conduit,” “caching,” or “hosting” (but not search services). Some countries go further to include safe harbors for search engines and hyperlink providers. Yet, from the perspective of Internet intermediaries, the safe harbors remain inferior to their American counterparts, providing less protection for copyright, trademark, defamation, and other claims. I explain here some of the deficiencies of the European law vis-à-vis U.S. law for Internet intermediaries. I reserve discussion of intermediary liability for copyright infringement for the following section.

First, the European approach stops far short of the near blanket exclusion from liability offered by the Communications Decency Act for non–intellectual property related wrongs. Second, the Electronic Commerce Directive largely adopts the DMCA’s notice-and-takedown approach, but leaves open the possibility of additional proactive responsibilities on the part of the online intermediary. Even while disavowing any duty to “monitor,” the European law expressly contemplates the imposition by member states of “duties of

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130 I do not mean to suggest that European law is invariably hostile to Internet intermediaries. For example, an Italian court recently rejected an attempt to hold Google liable for the automatically generated suggestions of additional search terms that happened to add offensive words after a person’s name. Giulio Coraggio, Google NOT Liable for Suggest Search Results, G AMINGTECHLAW (Jan. 4, 2013), http://www. gamingtechlaw.com/2013/04/google-not-liable-for-suggest-search.html.

131 See Eric Pfanner, YouTube Can’t Be Liable on Copyright, Spain Rules, N.Y. TIMES, Sept. 24, 2010, at B7 (quoting a London lawyer as saying, “‘The issue of when a host was liable has been getting a bit vague, and some hosts in Europe have been getting a little bit nervous’”); Bradley L. Joslove & Vanessa De Spiegeler- Delort, Web 2.0: Aggregator Website Held Liable as Publisher, INT’L L. OFFICE (June 26, 2008), http://www.internationallawoffice.com/newsletters/detail.aspx?g=4b014ec1-b334-4204-9b3-00e05bf6db95#11 (“[T]he scope of liability of Web 2.0 websites is an unsettled point of law.”).

care” on intermediaries to detect and prevent certain activities. 133 Third, the European directive lacks a statutory notice-and-takedown regime, creating greater uncertainty among European providers as to whether they have sufficient knowledge to withdraw liability if they do not delete material. 134 Finally, the European approach permitted injunctions against online service providers more liberally than the American approach, which was more attentive to the problem of prior restraint. 135 The Electronic Commerce Directive contemplates “orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.” 136

The difference between the American and European approaches to intermediary liability in trademark is evident when we contrast two authoritative decisions involving the same defendant (eBay) and similar facts on either side of the Atlantic (storied trademark holders claiming infringement). Before the European Court of Justice, L’Oréal sought to hold eBay liable for trademark infringement occurring on eBay’s site. 137 eBay relied on Article 14(1) of the Electronic Commerce Directive to argue that it was “not liable for the information stored at the request of a recipient of the service.” 138 The court held that this immunity would not be available where the operator had undertaken “an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale.” 139 The Court of Justice sent the case back to the national court for consideration of whether eBay “was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously.” 140 Reporting on the decision, the law firm of Latham & Watkins advised its clients that sites like eBay will “have to engage in a higher degree of self policing in the future, especially with respect to the offer for sale of well

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133 Id. at 6.
134 Peguera, supra note 128, at 490.
135 Id. at 486.
140 Id. para. 124.
known or famous brands.”141 They further observed that eBay might have to modify its system with respect to Europe to allow for easier identification of a seller: “It would be ironic, but predictable that it could become as difficult to open an account to sell goods on an auction site without proper identity checks as it is to open a bank account or instruct a lawyer in the EU.”142 By contrast, in Tiffany (NJ) Inc. v. eBay Inc., the Second Circuit Court of Appeals largely sided with eBay against the trademark holder.143 The U.S. court upheld summary judgment in favor of eBay on the issue of contributory liability for trademark infringement.144 It remanded the case on the issue of whether eBay had itself misled users in its advertising campaign invoking the Tiffany’s name.145 Commentators rightly hailed the case as a victory for Internet intermediaries.146

2. South Korea

Where U.S. law seeks to reduce the liability of Internet intermediaries for statements posted on their sites, South Korean law seeks to make intermediaries responsible for activities on their sites. In the wake of demonstrations against American beef exports to Korea organized online, the South Korean legislature imposed additional obligations on Internet intermediaries to police online behavior, on the theory that the public was manipulated by allegedly false claims about the threat of mad cow disease.147 It also imposed additional obligations on users themselves—the Framework Act on Telecommunications singles out those using electronic means to spread information: “A person spreading a false rumor maliciously intending to damage the public interest by using an electronic machine can be sentenced to imprisonment for under five years or given a fine under fifty million won.”148

142 Latham & Watkins, supra note 141, at 4.
143 600 F.3d 93, 109 (2d Cir. 2010).
144 Id.
145 Id. at 114.
146 Federal Appellate Courts Poised to Deliver Key Cyberlaw Rulings in 2012, 17 ELECTRONIC COM. & L. REP. 67 (2012) (characterizing decision as “a favorable ruling for online intermediaries”).
148 Id. at 59 (quoting Jeongtongsingsibonbeop [Framework Act on Telecommunications], Act No. 4393, Aug. 10, 1991, art. 47(1), amended by Act No. 10393, Jul. 23, 2010 (S. Kor.), translated at
Furthermore, like many countries, South Korea has a more liberal substantive standard for defamation (thereby favoring plaintiffs) and permits injunctive relief for defamation.\textsuperscript{149}

In 2009, the Korean Supreme Court issued a decision holding web portal sites Naver, Daum, SK Communications, and Yahoo Korea liable for the defamation of a person named “Kim” occurring on their sites.\textsuperscript{150} The court upheld judgments of 10 million won, 7 million won, 8 million won, and 5 million won, respectively, against these services, stating that a web service “must delete slanderous posts or block searches of the offending posts, even if not requested to do so by the victim.”\textsuperscript{151} While these were relatively small judgments amounting to just thousands of U.S. dollars (approximately $5,700 at the highest\textsuperscript{152}), this might well have caused sites to fear the accumulation of such fines. The court held that

the obligation of the portal site to remove the [defamatory material] arose when (a) the content was apparently illegal in the sense of defamation, and (b) the portal site had actual knowledge of the illegality of the infringing activity or, awareness of facts or circumstances from which infringing activity was apparent even without the [victim’s] notice . . . to the portal site.\textsuperscript{153}

Critics worried that the decision would chill speech, causing websites to delete user posts to preclude liability.\textsuperscript{154} The decision seems to confirm Kyu Ho Youm’s observation that, at least when reputation or honor is at risk, “South Korea does not protect freedom of expression as a transcendent value.”\textsuperscript{155}


\textsuperscript{151} Id.; accord Supreme Court [S. Ct.], 2008Da53812, Apr. 16, 2009 (S. Kor.).

\textsuperscript{152} For historical exchange rates at the date of the 2009 decision, see http://www.x-rates.com/historical/?from=EUR&amount=1.00&date=2009-04-16.

\textsuperscript{153} Memorandum from Sung Gi Hwang, Professor, Hanyang Univ., to author (Mar. 7, 2012) (on file with author).

\textsuperscript{154} Id.

\textsuperscript{155} Kyu Ho Youm, \textit{Defamation Law and the Internet in South Korea}, 9 MEDIA & ARTS L. REV. 141, 141 (2004) (citing article 21 of the Constitution of Korea, which provides that “Neither speech nor the press shall violate the honor or rights of other persons . . . ”).


\textsuperscript{151} Id.; accord Supreme Court [S. Ct.], 2008Da53812, Apr. 16, 2009 (S. Kor.).

\textsuperscript{152} For historical exchange rates at the date of the 2009 decision, see http://www.x-rates.com/historical/?from=EUR&amount=1.00&date=2009-04-16.

\textsuperscript{153} Memorandum from Sung Gi Hwang, Professor, Hanyang Univ., to author (Mar. 7, 2012) (on file with author).

\textsuperscript{154} Id.

\textsuperscript{155} Kyu Ho Youm, \textit{Defamation Law and the Internet in South Korea}, 9 MEDIA & ARTS L. REV. 141, 141 (2004) (citing article 21 of the Constitution of Korea, which provides that “Neither speech nor the press shall violate the honor or rights of other persons . . . ”).
In February 2012, the Korean Constitutional Court upheld the power of the Korea Communications Standards Commission under the Act on the Promotion of Information and Communications Network Utilization and Information Protection (the Network Act) to order the takedown of “unhealthy information” on the Internet. Importantly, however, the Network Act did not impose “penalties against non-compliance.”

3. Japan

Japan may not be a litigious society, but Internet providers seem to have faced their share of claims. In Japan, running a bulletin board service in 1997 might render you liable for the defamation occurring on that service. That year, a Tokyo trial court held Internet service provider Nifty Service liable for failing to delete defamatory messages. A heated exchange on a forum titled “Contemporary Ideas” had resulted in defamatory posts, which the forum’s manager left up, “apparently believing that continuing the discussion and trying to engage the parties in a more issue-oriented dialogue would address the problem.” It was not until 2001 that the Tokyo High Court would reverse the decision.

That same year, the Diet passed the Law Concerning the Limits of Liability for Damages of Specified Telecommunications Service Providers, under which a telecommunications service provider would not be liable for the actions of its users unless it knew, or where there was “reasonable ground to find that said relevant service provider could know[,] the violation of the rights of others was caused by the information distribution via said specified telecommunications.” Like the European approach, the law applies to all

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157 Id.
160 Id. at 801–02.
intermediary activity, whether involving copyright, trademark, or tort claims. By imposing not only an actual knowledge-and-takedown approach, but also a more vague “reasonable ground” that the provider “could know,” the 2001 limitation law was a pale shadow of the American § 230 from the perspective of Internet enterprises.

In 2002, the popular bulletin board service 2Channel was held liable using the approach of the 2001 law (but not its text because the complained of acts occurred before the law became effective). The court found that the site’s “management had been unreasonable in its refusal to remove the offensive posts when requested.” The posts arose on a thread entitled “Corrupt Animal Hospital.” 2Channel was fined 4 million yen (approximately $40,000) in damages. Salil Mehra suggests that while this was “not a particularly large amount, . . . it was a strong enough sign to change the behavior of 2Channel’s management.” The site’s duty to remove the infringing posts was upheld on appeal.

B. Copyright

1. European Union

Two directives help frame the inquiry of intermediary liability for copyright infringement in the European Union. As described above, the Electronic Commerce Directive of 2000 provided a set of exemptions from liability for “information society services” that store information at the request of users, including immunity from copyright infringement claims. The 2001 Copyright Directive offered an enumerated and exclusive list of exceptions to the rights of copyright holders. (footnotes omitted)
The two directives proved inferior to their U.S. counterparts from the perspective of Internet service providers for the opposite reasons. While the Electronic Commerce Directive followed the DMCA’s Title II in granting Internet service providers certain immunities arising from web hosting activities, it did not specify the exact circumstances that would guarantee freedom from liability. At the same time, the very specificity of the Copyright Directive undermined its usefulness to web enterprises. Rather than an open-ended doctrine of fair use, European law allowed only specified exceptions to the exclusive rights of the copyright holder. These proved less flexible in responding to technological developments than American fair use, which allowed a court to consider each new case individually based on multiple factors. As one British scholar notes, fair use “provide[d] the courts with some flexibility of response to change in the way copyright works are disseminated and used, whether arising from new technologies, social behavior or institutional structures.”

Even as late as 2008, European lawyers could only advise, “[T]he scope of liability of Web 2.0 websites is an unsettled point of law.” It was only at the end of 2011 and the beginning of 2012 that the European Court of Justice made clear that Internet intermediaries could not be required to affirmatively filter their entire networks for copyright infringement. In cases brought by the Belgian collecting rights society, SABA M, against Internet access provider Scarlet and online social network Netlog, the court held that enjoining these companies to filter on behalf of copyright owners uploads by all users would violate the privacy and speech rights of users, and would be unduly costly and burdensome to the Internet enterprise. While the judgments in SABAM v.

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170 Lilian Edwards also notes that the DMCA regime requires that the content provider be notified and allowed to contest the allegation of illegality, whereas the European regime does not. Lilian Edwards, The Fall and Rise of Intermediary Liability Online, in LAW AND THE INTERNET, supra note 169, at 47, 76.


172 Id. at 536 (“This more restrictive approach limits the room to manoeuvre for the courts. The District Court of Hamburg, for instance, refused to bring thumbnails of pictures displayed by Google’s image search service under the umbrella of the right of quotation.”).

173 Id. at 527 (“Leaving this discretion to the courts reduces the need for constant amendments to legislation that may have difficulty in keeping pace with the speed of technological development.”).

174 MacQueen, supra note 169, at 209.

175 Joslove & De Spiegeleer-Delort, supra note 131.

Netlog and Scarlet v. SABAM clearly support Web 2.0 enterprises, they arrived nearly a decade after the rise of such companies across the ocean.

2. South Korea

Korean law offers only weak protection for Internet intermediaries accused of abetting copyright infringement. In 2003, Korea adopted special provisions to regulate and protect online service providers (OSPs). However, the liability limitation operates differently from the safe harbor provisions in the DMCA in that it does not provide a qualifying OSP with a complete indemnity against secondary liability: the preventive measures undertaken by the OSP only serve to limit or reduce its liability, and only provide a complete indemnity when these measures are ‘technically’ infeasible or ineffective to prevent or stop the infringing activity.177

Korean peer-to-peer file trading service Soribada, having been warned by the courts that it could be held liable for the copyright infringement of its users, instituted a filtering system that “would deny a user’s request to download a file for which the copyright holder had specifically requested protection.”178 The Seoul High Court ruled against Soribada nonetheless, suggesting that Soribada could have designed its system to permit downloads only of music files for which the copyright owner had provided a license.179 This legal entitlement creating an opt-in system rather than an opt-out system has tremendous market importance, as few people (or companies) alter the default setting.180 This is what Lawrence Lessig characterizes as a “permissions culture”—ask first, before doing.181 In 2009, Korea introduced the world’s first graduated response law, a provision widely sought by the content industries.182

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178 Id. at para. 102.

179 Id. (citing Seoul High Court [Seoul High Ct.], 2006La1535, Oct. 10, 2007 (S. Kor.)).


Under the law, the Ministry of Culture, Sports, and Tourism can order a website hosting infringing material to remove that material, and to disable accounts of repeat offenders. Furthermore, the government can shut down the website itself if it fails repeatedly to remove material, after warning. Some suggested that graduated response could be used to silence political criticism “such as Agora, a discussion board operated by Daum (www.daum.net), which was a seedbed for anti-government criticism during the controversy over the beef issue.”

3. Japan

In Japan, developing a peer-to-peer file sharing service in the last decade might get you arrested. In 2002, Isamu Kaneko, a researcher at the University of Tokyo’s School of Information and Science Technology, began distributing a peer-to-peer file-sharing program he wrote called “Winny.” In May 2004, he was arrested for copyright infringement because he continued to distribute his program, despite being aware that some used it to infringe copyrights. After his arrest, Kaneko, an “idol” among programmers who had taught a series of lectures to nurture “superprogrammers,” resigned from his University position. In December 2006, the Kyoto District Court found him guilty, decrying his “selfish and irresponsible attitude” and concluding that he knew that Winny “was being used to violate the law and allowed users to do so.” Yet, the judge conceded that “Kaneko did not specifically intend to cause copyright violations on the Internet.” He was fined 1.5 million yen for the infringement. The Japanese Supreme Court would ultimately clear him of all charges, but not until December 2011.

Japan’s 2001 law limiting liability for Internet service companies in certain circumstances was far less friendly to such companies than the DMCA. Rather than the relatively clear safe harbors of the DMCA, Japan’s law removed any
protections if the provider knew or should have known of infringement occurring through its service, a far more uncertain standard, given the likelihood that some users will infringe on any Web 2.0 service.\footnote{See supra notes 161–62 and accompanying text.}

While legal clarity can sometimes help Internet companies, it can also undermine them. Like Europe, Japan enumerates specific exceptions to the rights of copyright holders, rather than the open-ended approach of American fair use law. This means that unless the particular action is authorized by an enumerated exception, it violates copyright. The lack of an explicit exception even made illegal the act of uploading a photo of artwork on an auction site in connection with its sale.\footnote{Yeyoung Chang, Debates on Introduction of “Fair Use” to the Copyright Act of Japan and Korea—Do Japan and Korea Need Fair Use? 7 (Comparative IP Academic Workshop, Working Paper No. 2, 2009), available at http://www.law.washington.edu/Casrip/WWIP/Papers/2009/Debates on Introduction of Fair use to the Copyright Act of Japan and Korea - Do Japan and Korea need Fair use.pdf.} Because this act was not for news reporting, criticism, or research (the enumerated exceptions), it was declared illegal.\footnote{Id.} In 2009, the Diet finally amended the Copyright Act to allow the use of thumbnails of a copyrighted work for an online auction.\footnote{Id.} Acts that Americans take for granted—such as the posting on a blog of a souvenir picture of Disneyland—can also potentially run afoul of Japanese copyright law, even after the 2009 amendment.\footnote{Tatsuhiro Ueno, Rethinking the Provisions on Limitations of Rights in the Japanese Copyright Act—Toward a Japanese-Style “Fair Use” Clause, 34 A.I.P.P.I. 159, 179 (2009); Chang, supra note 194, at 7.} The enumeration approach has led many to worry that new uses, especially ones made possible by new technologies, might not qualify for the exceptions.\footnote{Id., supra note 194, at 5–6 (noting criticism that the enumeration list approach makes it “hard to cover the all new types of use,” but preferring a “[b]alancing approach based on human rights” (internal quotation marks omitted)).} As one Japanese academic notes, “[I]f copyright exceptions are interpreted strictly by courts, most daily use might be copyright infringements.”\footnote{Id. at 7; see also Ueno, supra note 197, at 161 (noting that exception “provisions have been strictly (narrowly) interpreted”).} Japanese legal scholar Tatsuhiro Ueno portrays the end result of these rules: observing the existence of an American research website collecting cases of musical infringement stretching back over one hundred years, Ueno notes, “[I]f the same exact website were established in Japan, it would constitute an infringement of the right of public transmission.”\footnote{Ueno, supra note 197, at 181.} Another Japanese intellectual property scholar concludes, “Without a proper balance [between copyright protection and innovation], any
company that wants to introduce new technology services may be too cautious to start its business.”

Prime Minister Cameron’s concern about whether English law would have permitted Google might have also held true for Japan until 2010. Because of the lack of a broad fair use provision in Japan, the copying required for a search engine to function needed an express exemption from the copyright holder’s rights. Lacking such an express exemption, search engines faced the prospect of being illegal, until a 2009 amendment permitted search engines to copy copyrighted works for the purpose of displaying search results. Before this amendment went into effect in 2010, Google’s Fumi Yamazaki asked, “Did you know that running a search engine index server in Japan is illegal . . . ?” Yamazaki reports that before the amendment went into effect, “search engines in Japan such as Google and Yahoo inevitably kept their servers outside of Japan.”

This was consistent with the damning advice of a programming professor in the wake of the Winny conviction. Shinji Yamane, a researcher at the International University of Japan’s Center for Global Communications reported that after Kaneko’s conviction, his own students were “concerned about their products potentially violating the law.” Yamane continued, “I tell them to release the software overseas.”

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201 Naoya Isoda, Copyright Infringement Liability of Placeshifting Services in the United States and Japan, 7 WASH. J.L. TECH. & ARTS 149, 152 (2011).


204 Id.

205 Id.

206 Id. (internal quotation mark omitted).
This seems to have been the route followed by the popular Internet bulletin board, 2Channel, founded by Hiroyuki Nishimura in 1999. In 2004, *The New York Times* reported that Nishimura paid $20,000 a month to a company in Palo Alto to host the Japanese language service. While some might suggest that this simple sleight of hand might successfully avoid all the restraints I described earlier, that may not be so clear. In 2009, Nishimura sold the site to a Singaporean company, despite the fact that, according to *Wired*, the site generated 500 million page views per month. His foreign webhost had not prevented a “sea of litigation” against him and judgments amounting to millions of dollars. The legal risk involved in the operation may well have made it difficult for him to raise capital to, for example, take the site global.

C. Privacy

1. European Union

As James Whitman describes, European privacy law is a world away from the American laissez-faire approach. In October 1995, at the same time that the Clinton Administration was declaring its support for industry self-regulation, the European Union was announcing its elaborate and demanding Data Protection Directive. The 1995 Directive requires “unambiguous” consent before the automated processing of personal information. It further requires that information that is gathered must be “collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.” Rather than a sectoral approach
imposing obligations on certain health care and financial providers, European law offers omnibus protections covering all personal information. Certain categories of information processing—political, health, or sex-related information—are regulated even more tightly. The Directive requires that data controllers secure personal data against accidental or unauthorized disclosure. This Directive posed significant constraints on Web 2.0 enterprises, limiting their information-gathering and -sharing functions.

A 2002 directive, the Privacy and Electronic Communications Directive (the E-Privacy Directive), added even more constraints. The E-Privacy Directive included a broad requirement to ensure the confidentiality of communications, and banned the “surveillance of communications . . . without the consent of the user[].” The Directive required “clear and comprehensive information” before a company could store information such as cookies (used to track web behavior), and required the site to offer the ability to opt out of cookies. Such rules complicated the behavioral monitoring necessary for targeted advertising. They made it difficult to garner the datasets about an individual that might enable companies to know better how to cater to his or her interests (and means). Over the years, the E-Privacy Directive was interpreted and amended in ways that largely confirmed its constraints on tracking and information gathering, thus disabling sophisticated marketing capabilities.

The astonishing reach of the Data Protection Directive can be seen in the case known as Criminal Proceedings Against Bodil Lindqvist. Lindqvist was

215 See, e.g., id.
216 Id. at 43.
217 See, e.g., id. (requiring member states to implement technical and operational measures to protect the security of personal data).
219 Id. at 43.
220 Id. at 44.
a Swedish parishioner who published a website to assist fellow churchgoers in their confirmation process. She published personal information about her fellow parishioners on this site without their consent, including the fact that one person had “injured her foot.” For this, she was criminally prosecuted under the Swedish law implementing the Data Protection Directive. The European Court of Justice held that Lindqvist had indeed violated European privacy law because she had processed personal information about others (by making it available on the web), without their permission. What would have been readily protected under the First Amendment in the United States was subject to criminal prosecution in Europe.

In another notorious case, Google executives were convicted in Italy of crimes against privacy for not taking down rapidly enough a video ridiculing a disabled child. The executives were convicted specifically of the crime of “illicit treatment of personal data” (trattamento illecito dei dati) because “with the purpose of obtaining a gain they participated in the processing of the video [by distributing it through YouTube] containing health data of the disabled teenager without his consent.” The February 2010 convictions were overturned on appeal in December 2012, but the convictions demonstrated the ambiguities of a law that might sentence Internet executives for not policing their services sufficiently. This case again demonstrates what James Whitman describes as the “radically different” laws on both sides of the Atlantic on the liability of Internet providers for privacy offenses.

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223 Id. at I-12981.
224 Id. at I-13014.
225 Id. at I-12981.
226 Jacqueline Lipton suggests that Lindqvist’s case is not instructive for information disclosed via social networks because those networks generally make information available only to one’s “friends,” rather than the public at large. Jacqueline D. Lipton, Mapping Online Privacy, 104 NW. U. L. Rev. 477, 484 (2010) (“[T]he holding was limited to text-based information disclosed to the world at large on a publicly available website.”). However, the charge against Lindqvist was not that she disclosed information to the public, but rather that she processed information about others without their permission. See Lindqvist, 2003 E.C.R. at I-13003. Furthermore, Facebook’s and Google’s social networks give a user the option to share not only with her friends, but also the general public.
228 Id. at 361-62.
229 Eric J. Lyman, Italian Court Overturns 2010 Convictions of Google Executives over Bullying Video, 18 ELECTRONIC COM. & L. REP. 84, 84 (2013).
230 Whitman, supra note 21, at 1200.
2. South Korea

South Korean law offers substantial omnibus protections for privacy online. South Korea’s 2001 Network Act was modeled in part on the OECD Guidelines, as well as the German Online Service Data Protection Act (Teledienstedatenschutzgesetz) of 1997, which was itself passed to implement the 1995 European Data Protection Directive. The Network Act requires data processors to “obtain as little amount of personal data as required for the provision of the services,” obtain consent of the data subject for data processing, and safeguard security of the data. Failure to comply can result in fines, imprisonment, or both. In 2011, Korea passed an additional data protection law, the Personal Information Protection Act (PIPA), which, among other things, established a right to file class actions in court over alleged violations of the law. The new law requires privacy assessments by large database developers. Wherever there is an overlap between PIPA and other privacy protections, the stronger provisions will apply.

Korean privacy law is not a paper tiger. The law establishes a standing committee to mediate personal information disputes, with the power to award enforceable awards once mediation is selected. The committee awards compensatory damages “in almost all cases” where a privacy breach is found, with damages typically ranging from U.S. $100 to U.S. $10,000. The Korean authorities receive more than 17,000 complaints per year.

232 See id.
235 See Ryoo & Park, supra note 234, at 1, 3.
237 Id.
239 Id.
3. Japan

Japan enacted an omnibus privacy statute, the Personal Information Protection Act, in 2003. While explicit consent does not seem to be required before the collection of personal information, businesses cannot obtain personal information from individuals by “fraudulent or other unfair means.” The data collector must provide notice of the intended uses of the data. If plans change for the use of the information, “the change must not exceed the scope ‘reasonably recognized as having an appropriate connection with the original [purpose of use].’” Businesses cannot share personal information with third parties without the consent of the data subject. Businesses also have security obligations with respect to the personal data. Japan does not provide a private cause of action for data privacy violations, and even though consumer centers and the government receive over 12,000 complaints per year, the enforcement record remains unclear.

D. Application: Social Networks

The legal regime has influence in ways that are often difficult to perceive. Consider Facebook’s signal feature—its “News Feed,” which automatically supplies to your own Facebook page all the activity of your Facebook “friends.” Introduced in 2006, the feature met loud protests. Some mocked

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240 Asim Z. Haque & Mathiew H. Le, Recent Development, Privacy Year in Review: Canada’s Personal Information and Protection and Electronic Documents Act and Japan’s Personal Information Protection Act, 1 JUS J.L. & POL’Y FOR INFO. SOC’Y 477, 494 (2005).
241 Summary and Discussion of the New Act, PRIVACY & AM. BUS., Nov. 2003, at 17, 18 (internal quotation marks omitted).
242 Haque & Le, supra note 240, at 501 (citing Personal Information Protection Act, ch. 4, subch. 1, art. 18).
243 Id. at 500 (alterations in original) (citing Personal Information Protection Act, ch. 4, subch. 1, art. 15).
244 Id. at 502 (citing Personal Information Protection Act, ch. 4, subch. 1, art. 23); see also Rudy Guyon, Outline of Privacy Laws in Japan, Australia, APEC and Selected Other Asian Countries (from a Company Perspective), 902 PLI/Pat 481, 491 (2007) (“Specific consent must be obtained before transfer of personal information to a third party. . . . To obtain specific consent, in advance the data gatherer must notify the person providing the personal data of . . . [t]he specific items that will be provided to the third party . . . .”).
245 See Guyon, supra note 244, at 489.
247 Id. at 26; see also Greenleaf, supra note 238, at 6. Greenleaf writes that, even with limited evidence of enforcement, “it is possible that Japan’s legislation is observed by many companies and agencies, simply because it is the law.” Greenleaf, supra note 238, at 6.
Facebook as “Stalkerbook,” and some called for a “cyber-revolt.” A student at the University of Illinois, Kiyoshi Martinez, summarized the concern: “Every change I make becomes broadcasted with a bullhorn to everyone—all my friends.” Even though the information broadcast through the news feed was technically available to everyone who took the trouble to check out each of their friend’s homepages, this changed the valence of activity on Facebook. Individuals who had posted to their webpage, expecting that they were sharing information only with those who would take the trouble to come visit their site, now found that their information was being shared among their friends without their friends’ having to leave their own homepages. Many people belonged to school networks, so that any relationship changes were broadcast essentially to the entire student body. Responding to the protests, Facebook offered users the ability to limit the feature somewhat.

Could Facebook have introduced such a feature if it had been a European company? The feature did not pose any real technological hurdle (though Facebook now owns a patent for it). The idea and the willingness to implement it were all that were necessary. The European Data Protection Directive requires an individual’s “unambiguous” consent before any automated processing of personal information about that person. Facebook certainly did not ask its users to opt into this feature—it automatically included all of its users in broadcasting their information to their network, unless they opted out of such disclosures. The public protest in the United States at Facebook’s chutzpah (as it was then decried, now what many might consider prescience) was not followed by governmental action. Could a European social network have adopted such an innovation? Could Korea’s Cyworld social network, launched in 1999, have introduced such a feature without meeting the ire of the Korean authorities? Could Japan’s Mixi social network, launched at the same time as Facebook in February 2004, have tested the law with such a move?

249 Janet Kornblum, Facebook Alters Info Feature That Angered Users, USA TODAY, Sept. 8, 2006, at 4B (internal quotation marks omitted).
An exception to my general claim (also involving Facebook) demonstrates the rule. When Netflix, the world’s most popular Internet movie service, rolled out its integration with Facebook, the world’s most popular social network, it offered the service in forty-four of the forty-five countries in which it operated.\textsuperscript{254} The missing country? The United States.\textsuperscript{255} An obscure, narrow privacy statute proved what Netflix described as an insurmountable block to information sharing between Netflix and Facebook. In 1988, in the wake of the revelations of Supreme Court nominee Robert Bork’s video rental records, Congress made it illegal for a video rental service to reveal video rental records of any customer without that customer’s \textit{contemporaneous} permission.\textsuperscript{256} This Video Privacy Protection Act had an unexpected consequence some two decades later—effectively barring Netflix from sharing the video rental records of one Facebook user with that person’s Facebook network unless the first user consented to the sharing for each video (rather than through a blanket prior consent). Congress provided for a private cause of action, with minimum statutory damages of $2,500 for each violation.\textsuperscript{257} For a company like Netflix, with some twenty million American subscribers,\textsuperscript{258} the fines for ignoring the statute could conceivably entail a judgment in excess of its market capitalization.\textsuperscript{259} A relatively obscure and narrow privacy statute had foiled the social networking plans of two enormous multinational corporations (at least until they lobbied to have the law changed\textsuperscript{260}). Imagine the consequences of far broader and more demanding privacy laws outside the United States.

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\textsuperscript{255} Id. Whether European data privacy rules would foil Facebook–Netflix integration has yet to be tested because Netflix is not currently available in most European countries. See Catherine Shu, Netflix Will Launch in the Netherlands Later This Year as Its International Expansion Slows, TECHCRUNCH (June 18, 2013), http://techcrunch.com/2013/06/18/netflix-will-launch-in-the-netherlands-later-this-year-as-its-international-expansion-slow/ (explaining that the Netherlands will be Netflix’s seventh European country).

\textsuperscript{256} 18 U.S.C. § 2710(b)(2)(B) (2006) (permitting disclosure of video rental records “with the informed, written consent of the consumer given at the time the disclosure is sought”).

\textsuperscript{257} Id. § 2710(c). The statute authorizes courts to impose punitive damages and attorneys’ fees in addition to statutory damages.

\textsuperscript{258} Netflix, Inc., Annual Report (Form 10-K) 24 (Feb. 10, 2012).


But what of Germany’s StudiVZ, Japan’s Mixi, Spain’s Tuenty, and South Korea’s Daum and Naver? Should not these services be illegal as well? How can we explain the emergence and persistence of indigenous European Web 2.0 enterprises if the local law is so adverse to their existence? In part, these companies can shelter under the operations of their American counterparts, at least now that the American firms are well established. If local authorities challenge them, those authorities may be implicitly threatening the American colossi. Legal risks may well make it more difficult for them to raise capital to scale up.261 Perhaps even more importantly, the law hampers their ability to innovate, to offer new services (e.g., a map of their world, a timeline of their life, a tracking of their movements, a seamless link between the individual and corporations with whom she relates). One might note that Facebook and Google have come to increasingly dominate in both Germany and Spain, despite what one might suppose to be the local advantages of StudiVZ and Tuenty.262

III. AVOIDING “FROM WOW TO YUCK”

Innovation scholar Vicki Colvin warns about a “wow” to “yuck” trajectory for nanotechnology.263 Speaking before Congress in 2003, she worried that the early enthusiasm for this new technology would be replaced by popular revulsion in the face of its unintended consequences.264 Colvin advised, “The good news is that it is not too late to ensure that nanotechnology develops responsibly and with strong public support.”265

261 See Maija Palmer, A Future Alongside Facebook, FIN. TIMES, Feb. 25, 2010, at 10. The Financial Times offered backhanded support for local alternatives to the American services, observing that “they can be viable little businesses.” Id. (internal quotation mark omitted).

262 See Daten und Fakten, STUDIVZ, http://www.studivz.net/l/about_us/1 (last visited Jan. 10, 2014) (providing German language services and programs to 16 million users). StudiVZ lost one million users from 2010 to 2011. See id. (last updated Mar. 3, 2011), http://web.archive.org/web/20110303060121/http://www.studivz.net/l/about_us/1 (accessed by searching for the website in the Internet Archive) (noting StudiVZ served seventeen million users in 2010); see also FITTKAU & MAAS CONSULTING, W3B REPORT ON FACEBOOK GOOGLE+ & CO.: NUTZER, NUTZUNG, POTENTIALE 8 (2011), available at http://www.lebensmittelzeitung.net/studien/pdfs/380_.pdf (reporting that in mid-2011, Facebook had 44.3% of the German market, with the highest local competitor attaining only 9.5%); Palmer, supra note 261 (noting that French social network Skyrock “has lost about a third of its audience” to Facebook).

263 Hearings, supra note 23, at 49 (statement of Vicki L. Colvin, Executive Director, Center for Biological and Environmental Nanotechnology).

264 Id.

265 Id.
Silicon Valley too has captivated the world, becoming the paragon of a knowledge economy. Its enterprises have utilized the Internet and the World Wide Web to develop history’s most powerful and popular platforms for instant communications. These firms improve the productivity of workers and disseminate knowledge across the world. Individuals increasingly learn through tutorials posted on YouTube. Facebook, YouTube, and Twitter played key roles in mobilizing support for those seeking to depose Arab tyrants by allowing citizens to express their grievances, inform each other, and organize together.\footnote{See generally Anupam Chander, *Jasmine Revolutions*, 97 CORNELL L. REV. 1505 (2012) (discussing the role of the Internet in the Arab revolutions).}

At the same time, by becoming the global engines for communication, Silicon Valley enterprises have also become hosts for insults, lies, and hate speech. The enterprises know more about us than other companies, or even most governments, have ever known, holding dossiers that might have impressed the Stasi.\footnote{Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1825 (2012) (describing Facebook’s dossier on one Austrian student as some 1,200 pages long); Anupam Chander, *Googling Freedom*, 99 CALIF. L. REV. 1, 14 (2011) (describing the tactics of the Stasi).} Today, companies know what you read,\footnote{See Alexandra Alter, *Your E-Book Is Reading You*, WALL ST. J., June 29, 2012, at D1.} what you search for, who your friends are, what you buy or browse, your politics, and your sexual orientation.\footnote{Heather Kelly, *Facebook ‘Likes’ Can Reveal Your Secrets, Study Finds*, CNN TECH (Mar. 11, 2013, 12:30 PM), http://www.cnn.com/2013/03/11/tech/social-media/facebook-likes-study/index.html.} Armed with this information, American Internet companies have helped to rat out dissidents in authoritarian states.\footnote{See Chander, supra note 266.} In the hands of an authoritarian (or even democratic\footnote{Revelations about domestic spying even in the United States during the course of this writing have proved disturbing. See, e.g., Barton Gellman, *NSA Repeatedly Broke Privacy Rules*, WASH. POST, Aug. 16, 2013, at A1 (detailing oversteps by government agencies in regard to privacy controls since 2008).} government, “does the Internet render an entire population prisoner to a national Panopticon?”\footnote{Chander, *Googling Freedom*, supra note 267, at 10.} An example from the brick-and-mortar world hints at the concern: the American retail store Target figured out a teenager was pregnant before her father did, likely based on monitoring of in-store purchases.\footnote{Kashmir Hill, *How Target Figured Out a Teen Girl Was Pregnant Before Her Father Did*, FORBES (Feb. 16, 2012, 11:02 AM), http://www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/.} This clearly falls on the “yuck” side of customer profiling.

The legal historian Morton Horwitz decried what he believed to be the subsidies that the law implicitly offered to industrialists in the nineteenth
century: “forced subsidies to growth coerced from the victims of the process,” he charged. Horwitz argued that the “tendency of subsidy through legal change during [the antebellum years] was dramatically to throw the burden of economic development on the weakest and least active elements in the population.”

The subsidies offered to Silicon Valley enterprises through legal privileges were not without their costs. Return to the plight of actress Christianne Carafano, subjected to a “cruel and sadistic identity theft.” A malicious person using a computer in Berlin posted a false dating profile of her, providing her actual address. Once the website learned of the wrongdoing, it hid the profile and later deleted it. When she sued Metrosplash for permitting such a profile in the first place, her case was thrown out, barred by § 230. Even with a notice-and-takedown regime, as preferred by some critics, Carafano would not have had a case, given that Metrosplash seems to have promptly corrected the falsehood. But § 230 would likely have immunized Metrosplash even if it had left the material up because it did not have a hand in producing it. And chasing the wrongdoer utilizing a computer in Berlin might have proven difficult.

The costs of the privileges provided to Silicon Valley were widely dispersed. The victims included individuals whose privacy was jeopardized and others who were defamed through web services. In Mancur Olson’s terms, they (or perhaps we) are a classic “latent group,” dispersed and unorganized, and thus at risk of losing in the political process. Yet, the political economy is not entirely so clear. A large, well-organized, and economically powerful constituency—Hollywood—did in fact lobby against Silicon Valley’s exemptions. This resulted in a stricter intermediary liability regime for copyright than for tort. The political economy analysis is complicated further by the fact that the results are not consistent across jurisdictions. The

274 Horwitz, supra note 17, at xvi.
275 Id. at 101.
276 Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1120 (9th Cir. 2003); see supra notes 64–68 and accompanying text.
277 Carafano, 339 F.3d at 1121.
278 Id. at 1122.
279 Id. (noting the dispositive question on appeal was whether the suit was properly barred by § 230).
281 The DMCA’s Title II regulated intermediary liability in copyright, the common law regulated intermediary liability in trademark, and § 230 provided immunity for torts.
intermediary liability rules in Europe, South Korea, and Japan proved quite different, as we have seen.

A focus on costs alone would be woefully incomplete. While the costs of Silicon Valley’s privileges were widely dispersed, it is important to note that so were their benefits. Most of us have gained from our greater access to knowledge, and from our ability to speak directly to the world and to hear directly from it, and to engage and enlarge our social networks. Imposing strict obligations on intermediaries might well come at the price of both speech and innovation.

Are there ways to minimize the negative consequences of a no-liability, laissez-faire regime for Internet firms yet preserve the “breathing space” that such firms clearly need to innovate? Some have suggested that the notice-and-takedown regime employed for copyright should be extended to defamation. Some law and economics scholars (including Nobel economics laureates Kenneth Arrow and Gary Becker) have suggested that Internet intermediaries can deter copyright infringement “at low cost and without any significant interference with non-infringing uses.” Others would suggest that the law tilts too strongly in favor of copyright holders: Pam Samuelson has argued that the DMCA’s Title I favored the copyright industries, harming the information technology industries in the process. Many have bemoaned the lack of substantial privacy protections in the United States, arguing that we should “renegotiate [the] Faustian bargain” struck between web users and websites. These are all controversial suggestions, some of which might even pose an existential threat to a free Internet (here I mean free, as in beer).

Should we see these legal privileges as a way to kick-start an infant industry (and thus temporary), or as a response to the fundamentally new

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282 See supra note 125 and accompanying text (quoting British Prime Minister David Cameron).
285 Samuelson, supra note 95, at 523–24 (“One would have thought, given the Framework’s principles and the Administration’s enthusiasm for the strong economic performance of the information technology sector, that the Administration would have taken a more balanced position on these issues.”); accord Anupam Chander, Exporting DMCA Lockouts, 54 CLEV. ST. L. REV. 205 (2006).
nature of such enterprises (and thus permanent)? Was a modification to tort law the best way to subsidize the new industry of Internet services? Economists often prefer subsidization through direct transfers, rather than the relatively opaque adjustment of the law. But given the fact that liability exposure might have shuttered the business entirely, only very large direct transfers might have served to counter the legal risks entailed in continuing. Indeed, bringing on new users might have generally proven uneconomical because statutory damages were far in excess of actual damages.

It is possible that the promise of strong privacy-protective legal framework might be attractive to consumers. Viviane Reding, the EU Commissioner responsible for Justice, Fundamental Rights and Citizenship, justified a stronger, unified European privacy regime, in terms starkly resounding in regulatory competition: “The new rules . . . give EU companies an advantage in global competition. . . . [T]hey will be able to assure their customers that valuable personal data will be treated with the necessary care and diligence. Trust . . . will be a key asset for service providers and an incentive for investors . . . locating services.” However, thus far there seems to be little migration from American social networks to European or Asian ones, drawn by stronger privacy regimes.

The legal moves described here in the United States have helped facilitate the “wow” of the World Wide Web, but they might also usher in the “yuck.” We need to ensure that in our zeal for promoting Internet enterprise, we do not haphazardly create the conditions for a dystopia.


This serves also to suggest a response to the claim that the assignment of the legal privilege will prove irrelevant to the efficient distribution of resources in conditions of negligible transactions costs. See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960) (discussing the collective action problems surrounding transaction costs). Transaction costs here are in fact quite significant, often involving millions of people in highly diverse conditions and across multiple jurisdictions. The task of privately assembling the requisite rights with respect to such a broad array of persons—some of whom would not be on the system at all—seems quite overwhelming.

CONCLUSION: THE HACKER WAY

Mark Zuckerberg calls his approach to innovation the “Hacker Way.”290 “Move fast and break things,” he tells Facebook’s designers and engineers.291 But because of Clinton, Congress, and the Courts, most of the time Facebook’s amazing innovations did not break the law.

In the same month that Zuckerberg revealed this in the company’s IPO prospectus, another major investment was made in a social media enterprise. The Japanese firm Rakuten led a $100 million investment into Pinterest, a website that allows an individual to copy any image across the web to post on one’s own scrapbook page.292 Were it not for safe harbors in the law, Rakuten would likely have been loath to invest in a company whose business model relied on its users’ engaging in rampant copyright infringement. Even more important, without such safe harbors, people everywhere would have been denied a simple way to express themselves and to share what they love with the world.

Facebook and Pinterest exemplify the “democratic experimentation” that Lawrence Lessig foresaw in 1995 arising from the new cybertechnologies.293 While Lessig worried about stultifying regulation of this new medium,294 over the next half-decade, we saw active intervention by both Congress and the Courts, but largely designed to limit the reach of existing law. This made possible the democratic experimentation of companies like Facebook and Google, which introduced innovations subject largely to the approval or disapproval of users rather than the law. A brilliant Japanese entrepreneur during the same period might find the police knocking on the door.295

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290 Facebook, Inc. Registration Statement, supra note 127, at 69 (letter from Mark Zuckerberg).
291 Id. at 70.
294 Lessig, supra note 293, at 1752–53 (“A prudent Court—Supreme Court, that is—would find ways to let these questions simmer for a while, to let the transition into this new space advance, before venturing too boldly into its regulation.”).
295 See supra notes 158–67, 186–92 and accompanying text.